# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1958 / 1959

## No. 127 /

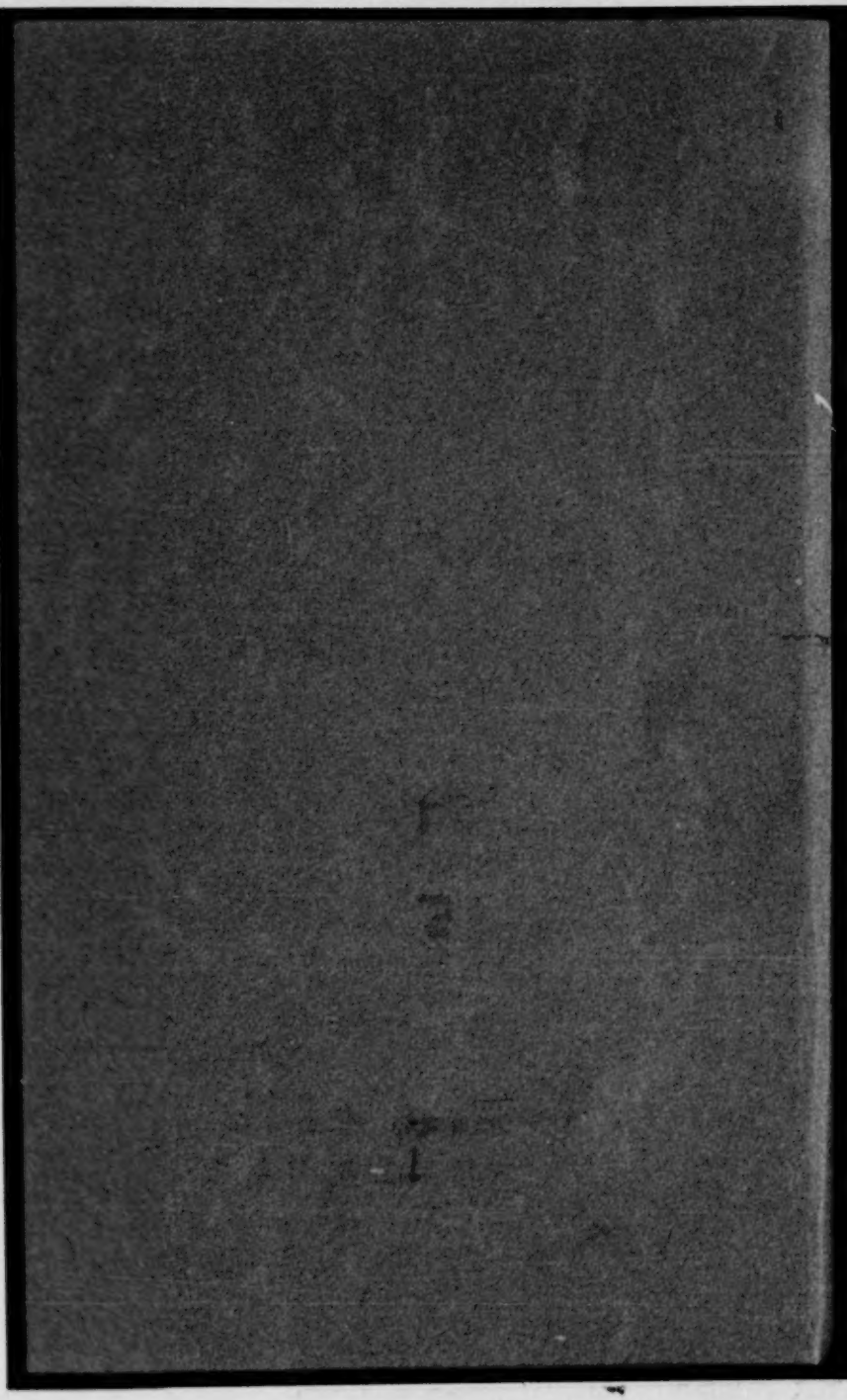
ROBERT AQUILINO AND JOSEPH SPERO, d/b/a HOME MAINTENANCE COMPANY, AND COLONIAL SAND AND STONE CO., INC., PETITIONERS,

*vs.*

UNITED STATES OF AMERICA, ADA BOTTONE, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 20, 1958
CERTIORARI GRANTED FEBRUARY 24, 1959



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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

## No. 132

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*vs.*

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## INDEX


| | Original | Print |
|---|---|---|
| Record from the Appellate Division of the Supreme Court of New York, Second Judicial Department | 1 | 1 |
| Statement under Rule 234 | 1 | 1 |
| Proceedings in the Supreme Court of the State of New York, County of Westchester | 5 | 3 |
| Notice of appeal | 5 | 4 |
| Order and judgment appealed from | 8 | 5 |
| Notice of motion for summary judgment of plaintiffs in Action No. 1 | 13 | 8 |
| Affidavit of Robert Aquilino, read in support of motion of plaintiffs in Action No. 1 | 16 | 10 |
| Complaint in Action No. 1, read in support of motion of plaintiffs in Action No. 1 | 23 | 15 |
| Exhibit "A"—Contract dated August 25, 1952 between Home Maintenance Co., and Fleetwood Paving Co. | 29 | 19 |


RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 13, 1959

| | Original | Print |
|---|---|---|
| Proceedings in the Supreme Court of the State of New York, County of Westchester—Continued | | |
| Notice of motion for summary judgment of plaintiffs in Action No. 1—Continued | | |
| Answer of defendant, Ada Bottone, in Action No. 1, read in support of plaintiffs in Action No. 1 | 31 | 20 |
| Complaint in Action No. 2, read in support of motion of plaintiffs in Action No. 1 | 33 | 22 |
| Answer of defendant, Ada C. Bottone, in Action No. 2, read in support of motion of plaintiffs in Action No. 1 | 43 | 28 |
| Stipulation as to answers in Actions No. 1 and No. 2, read in support of motion of plaintiffs in Action No. 1 | 46 | 30 |
| Stipulation as to consolidation, read in support of motion of plaintiffs in Action No. 1 | 48 | 31 |
| Order of substitution, read in support of motion of plaintiffs in Action No. 1 | 49 | 32 |
| Answer of defendant, United States of America, in Action No. 1, read in support of motion of plaintiffs in Action No. 1 | 51 | 33 |
| Answer of defendant, United States of America, in Action No. 2, read in support of motion of plaintiffs in Action No. 1 | 55 | 36 |
| Notice of cross-motion of plaintiff in Action No. 2 | 59 | 38 |
| Affidavit of Michael R. Iorio, read in support of cross-motion of plaintiff in Action No. 2 and in opposition to motion of plaintiffs in Action No. 1 | 61 | 40 |
| Notice of cross-motion of defendant, United States of America, in Actions No. 1 and No. 2 | 68 | 45 |
| Affidavit of J. Donald McNamara, read in support of cross-motion of defendant, United States of America, in Actions No. 1 and No. 2 | 70 | 46 |
| Exhibit "A"—Certified copy of certificate of assessments and payments, Treasury Department Form 899 | 72 | 49 |
| Exhibit "B"—Notice of federal tax lien(s) under internal revenue laws | 74 | 51 |


COPY BOUND CLOSE IN CENTER

| | Original | Print |
|---|---|---|
| Proceedings in the Supreme Court of the State of New York, County of Westchester—Continued | | |
| Opinion, Brennan, J. | 76 | 52 |
| Stipulation waiving certification | 79 | 54 |
| Notice of appeal to Court of Appeals | 81 | 55 |
| Order of Court of Appeals granting leave to appeal | 84 | 57 |
| Order of Appellate Division denying leave to appeal | 86 | 58 |
| Order appealed from | 88 | 60 |
| Opinion of Appellate Division | 91 | 62 |
| Stipulation waiving certification | 95 | 65 |
| Opinion of the Court of Appeals, Fuld, J. | 98 | 65 |
| Remittitur of the Court of Appeals | 104 | 70 |
| Order denying motion for reargument and granting motion to amend remittitur | 108 | 72 |
| Notice of motion and brief in support of motion for reargument and in the alternative for an order amending the remittitur | 112 | 74 |
| Judgment filed in Supreme Court, Westchester County, New York, on remittitur of Court of Appeals | 121 | 80 |
| Order allowing certiorari | 126 | 82 |

COPY BOUND CLOSE IN CENTER

[fol. 1]

**IN THE NEW YORK SUPREME COURT**
**APPELLATE DIVISION—SECOND DEPARTMENT**

---

Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

FLEETWOOD PAVING CORPORATION, Defendant,

—and—

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

---

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

—and—

HOME MAINTENANCE COMPANY, Defendant-Respondent.

---

STATEMENT UNDER RULE 234

Robert Aquilino and Joseph Spero, doing business as Home Maintenance Co., began Action No. 1 by serving fol. 2] copies of a summons and complaint on Ada Bottone, Fleetwood Paving Corp. and on Colonial Sand & Stone Co., Inc., and filing the originals in the New York Supreme

Court, Westchester County, on or about June 15, 195
Home Maintenance Co. filed a notice of the pendency
Action No. 1 on June 12, 1953.

Colonial Sand & Stone Co., Inc., instituted Action No.
in the Supreme Court, Westchester County, on June 4, 19
in order to foreclose a mechanic's lien; on the same date
filed a lis pendens. Copies of the summons and complai
were served on Ada Bottone and Mario's Miramare Re
taurant on July 8, 1953, and on Messrs. Aquilino and Sper
doing business as Home Maintenance Co., on July 9, 195

Ada Bottone, owner of Mario's Miramare Restauran
filed an answer in both actions. Fleetwood Paving Cor
appeared in both actions but never filed an answer in eithe
Home Maintenance Co. and Colonial Sand & Stone Co., In
stipulated that each will be deemed to have denied th
material allegations of each other's complaint. Later, a
counsel stipulated that both cases would be heard and/
tried together.

On June 10, 1954, Ada Bottone moved in both actions
substitute the United States for herself upon the deposit
$2,200. Justice Arthur D. Brennan of the Supreme Cou
of Westchester County granted Ada Bottone's motion an
[fol. 3] entered an order for substitution in both actions
July 28, 1954.

The requirements of Justice Brennan's order were ca
ried out and the United States was made a party defenda
in Actions No. 1 and No. 2. The United States served an
filed answers in Actions No. 1 and No. 2 on or abo
September 30, 1954.

In February of 1955, Home Maintenance Co. and Coloni
Sand & Stone Co., Inc., moved and cross-moved respectivel
for summary judgment; and the United States then cros
moved for summary judgment. All motions were hea
together before Justice Brennan, who filed an opinion
March 17, 1955.

Justice Brennan granted the motion of Home Maint
nance Co. and the cross-motion of Colonial Sand & Sto
Co., and denied the cross-motion of the United State
Under the opinion, Home Maintenance Co. and Coloni
Sand & Stone Co., Inc., were to share "pari-passu" in th
$2,200. deposited into the Court by Ada Bottone.

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Upon proper notice an Order and Judgment was settled and signed by Justice Brennan, and entered in both cases by the Clerk of the Court on March 28, 1955.

The United States filed a notice of appeal from the order and judgment of Justice Brennan on April 27, 1955.

Throughout this action counsel for Home Maintenance Co. has been Charles S. Friedman; for Colonial Sand & [fol. 4] Stone Co., Inc., Jacob I. Goodstein. Ada C. Bottone and Fleetwood Paving Corp. have been represented by Cribari, Scapolito & Solinger. The United States was initially represented by J. Edward Lumbard, then United States Attorney for the Southern District of New York. Mr. Lumbard's successor, Lloyd F. MacMahon, became the attorney for the United States for a period; and, presently, United States Attorney Paul W. Williams is its attorney in this case.

There have been no changes of parties or attorneys since the commencement of these cases, except those indicated in this statement.

---

[fol. 5]

IN THE SUPREME COURT OF NEW YORK
WESTCHESTER COUNTY

---

Action #1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs,

—against—

UNITED STATES OF AMERICA, FLEETWOOD PAVING CORP., and COLONIAL SAND AND STONE CO., INC., Defendants.

---

Action #2

COLONIAL SAND AND STONE CO., INC., Plaintiff,

—against—

UNITED STATES OF AMERICA, MARIO'S MIRAMARE RESTAURANT, HOME MAINTENANCE CO., and FLEETWOOD PAVING CORP., Defendants.

---

NOTICE OF APPEAL—April 27, 1955

Sirs:

Please Take Notice that the United States of America, the defendant in both Action No. 1 and Action No. 2 above, hereby appeals to the Appellate Division of the Supreme Court in and for the Second Judicial Department from the order and judgment of this Court, signed by Justice Arthur D. Brennan and dated March 28, 1955, which order granted the motion of plaintiffs in Action No. 1 for summary [fol. 6] judgment and granted the motion of the plaintiff in Action No. 2 for summary judgment and denied the cross-motion of the United States for summary judgment, and which judgment directs the County Clerk of Westchester County to pay over the sum of $2,200. to the plaintiffs in the above-entitled actions, and from each and every part of the aforesaid order and judgment.

Dated: New York, N. Y., April 27, 1955.

Yours, etc.,

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, United States of America, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Jacob I. Goodstein, Esq., Attorney for Defendant, Colonial Sand and Stone in Action No. 1 and for Plaintiff in Action No. 2, 21 East 40th Street, New York, N. Y.

[fol. 7] Cribari, Scapolito & Solinger, Esqs., Attorneys for Defendant, Fleetwood Paving Corp., 100 Stevens Avenue, Mt. Vernon, New York.

Charles S. Friedman, Esq., 10 Fiske Place, Mt. Vernon, New York, Attorney for Plaintiffs in Action No. 1 and Defendant Home Maintenance Co. in Action No. 2.

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fol. 8]

IN THE SUPREME COURT OF NEW YORK
WESTCHESTER COUNTY

ORDER AND JUDGMENT APPEALED FROM—March 28, 1955

'resent—Hon. Arthur D. Brennan, Justice.

A motion having been duly made herein by the plaintiffs
1 Action No. 1 above entitled, for summary judgment in
avor of said plaintiffs striking out the Answer of the
efendant, United States of America, and dismissing the
ross-claim set forth in said Answer, and further declaring
iat the lien of the plaintiffs in Action No. 1 above entitled,
a valid lien against the premises described in the com-
laint in said Action for the sum of Fourteen Hundred
$1400.00) Dollars, and declaring that the lien of said plain-
ffs attach to the moneys heretofore deposited by a former
efendant, Ada C. Bottone, with the Clerk of the County
f Westchester pursuant to an order of this court bearing
ate July 28, 1954, and granting judgment establishing
aid lien as a good and valid mechanic's lien; and there-
fter the plaintiff in Action No. 2 above entitled, having
oved this court for an Order granting summary judgment
ursuant to Rule 113 of the Rules of Civil Practice in favor
ol. 9] of the plaintiff in Action No. 2 establishing and
djudicating that the lien of the plaintiff in Action No. 2
a good and valid lien in the sum of Eight Hundred
inety-six and 25/100ths ($896.25) Dollars against the
eal property described in the complaint and establishing
iat the liens filed by both of the plaintiffs in the above
titled Actions, be declared to be superior and prior to
e tax liens and claims of the United States of America
asserted in the Answer of the said defendant, United
tates of America, and adjudging that the aforesaid liens
said defendant are subject and subordinate to the liens
both plaintiffs in the above named Actions, and that the
dgment to be entered herein direct the County Clerk
Westchester County to pay out, distribute and turn over
e sum of Twenty-two Hundred ($2200.00) Dollars de-
sited by Ada C. Bottone with said County Clerk pur-
iant to the aforesaid order of this court, and that said

plaintiffs share pro-rata without priority to either of the plaintiffs in Actions Nos. 1 and 2; and thereafter the defendant, the United States of America, have made a cross-motion for an order granting a summary judgment to the defendant the United States of America, pursuant to Rule 113 of the Rules of Civil Practice, upon the ground that there is no genuine issue as to any material fact and that the said defendant is entitled to judgment as a matter of law;

And said several motions having duly and regularly come on to be heard before this Court, Hon. Arthur D. [fol. 10] Brennan, one of the Justices of this Court, presided, at Special Term, Part I thereof, on the 16th day of February 1955;

Now, upon reading and filing the Notice of Motion in behalf of the plaintiffs in Action No. 1, dated January 21, 1955, together with the affidavit of Robert Aquilino, sworn to the 21st day of January, 1955, and the pleadings in both of the above entitled Actions thereto annexed, and upon the Order of this Court dated July 28, 1954, heretofore entered in both of said Actions, substituting the United States of America as a party defendant in the place and stead of the original defendant in both of said Actions, Ada C. Bottone, and upon the stipulation annexed to said motion papers dated respectively, May 5, 1954 and August 11, 1953, all of which were read in support of the motion of the plaintiffs in Action No. 1;

And on reading and filing the Notice of Motion of the plaintiff in Action No. 2 dated January 27, 1955, together with the affidavit of Michael R. Iorio, sworn to the 27th day of January, 1955, thereto annexed, read in support of the motion of the plaintiff in Action No. 2;

And upon reading and filing the Notice of Motion of the defendant the United States of America, dated February 11, 1955, together with the affidavit of J. Donald McNamara, sworn to the 11th day of February, 1955, with the exhibits thereto annexed, consisting of a Certificate of Assessments [fol. 11] and Payments, Treasury Department Form #899 and Notice of Federal Tax Liens Under Internal Revenue

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Law, Treasury Department Form #668, all read in opposition of the motions of both plaintiffs in the above entitled Action, and in support of the motion of the defendant the United States of America for summary judgment as aforesaid;

And after hearing Harold M. Edwards of counsel for the plaintiffs in Action No. 1, in support of the motion made in behalf of said plaintiffs, Isidore Zamore, of counsel for the plaintiff in Action No. 2 in support of the motion made by said plaintiff, and J. Donald McNamara, Assistant United States Attorney for the Southern District of New York, of counsel for the defendant United States of America, in opposition to the motions made by both the plaintiffs in the above entitled Actions and in support of the cross-motion made by the defendant, the United States of America herein; and upon filing the opinion of the Court it is hereby

Ordered, that the motion of the plaintiffs in Action No. 1 above entitled, for summary judgment under Rule 113 of the Rules of Civil Practice be, and the same hereby is, granted to the extent hereinafter set forth, and it is further

Ordered, that the motion of the plaintiff in Action No. 2 above entitled, for summary judgment under Rule 113 of the Rules of Civil Practice, be, and the same hereby is granted to the extent hereinafter set forth, and it is further

[fol. 12] Ordered, that the cross-motion of the defendant, the United States of America, be, and the same hereby is, in all respects, denied, and it is further

Ordered, adjudged and decreed that the Answer of the defendant, the United States of America, interposed in both the entitled actions, shall be, and the same hereby are stricken out and dismissed, and it is further

Ordered, adjudged and decreed that the plaintiffs in Action No. 1, have a valid lien for the sum of $1400.00 against the fund hereinafter set forth, and that the plaintiff Action No. 2 has a valid lien against said fund for the sum of $896.25, and it is further

Ordered, adjudged and decreed that each of the plaintiffs in the above entitled Actions, shall be and they hereby are declared to be entitled to their proportionate shares of the fund now on deposit with the Clerk of the County of Westchester, together with any accrued interest thereon remaining in the hands of said Clerk, and it is further

Ordered, adjudged and decreed that the County Clerk of Westchester County, or such other fiscal representative of the County of Westchester having possession of funds heretofore deposited by the former defendant herein, Ada C. Bottone, to the credit of the two above entitled Actions, amounting at the time of such deposit to the sum of [fol. 13] $2,200.00, shall be and he hereby is directed, upon presentation to him of a certified copy of this Order and Judgment, to pay over the aforesaid fund to the plaintiffs in the above entitled Actions in the following proportions:

To: Plaintiffs Robert Aquilino and Joseph Spero, co-partners doing business under the firm name and style of Home Maintenance Co.: Such fraction thereof as the sum of $1400.00 bears to $2,296.25.

To: Plaintiff Colonial Sand and Stone Co., Inc.: Such fraction thereof as the sum of $896.25 bears to $2,296.25.

Enter

/s/ Arthur D. Brennan, Justice of the Supreme Court.

Edward L. Warren, Clerk.

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IN THE SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS IN ACTION No. 1—January 21, 1955

Sirs:

Please Take Notice that upon the pleadings in the two above entitled actions, copies of which are hereto annexed, and more particularly upon the answer of the defendant, United States of America, and the separate defense and [fol. 14] cross-claim therein set forth, and upon the an-

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nexed affidavit of Robert Aquilino, one of the plaintiffs in the above entitled action, duly verified the 21st day of January, 1955, which is hereto annexed, and upon all other papers and proceedings heretofore had, including the annexed notice of appearance in behalf of the defendant, Fleetwood Paving Corp., the order of this Court substituting United States of America in the place and stead of the defendant Ada Bottone, which order bears date the 28th day of July, 1954, and the stipulations dated respectively May 5, 1954 and August 11, 1953, all of which documents are hereto annexed and made part of this application, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Westchester at the County Court House in the City of White Plains, N. Y., on the 11th day of February, 1955, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and judgment in favor of the plaintiffs and against the defendant, United States of America, in Action No. 1 above entitled, striking out the answer of the defendant, United States of America, and the cross-claim set forth in said answer, and for summary judgment in favor of the plaintiffs thereon and against the defendant, United States of America, pursuant to Rule 113 of the Rules of Civil Practice, and

Please Take Further Notice that upon all of the papers heretofore enumerated, the undersigned will at the same [fol. 15] time and place move this Court for a further order, pursuant to Rule 113 of the Rules of Civil Practice, granting to the plaintiff summary judgment in Action No. 1 above entitled, adjudging that the plaintiffs have a valid lien upon the premises described in the complaint in said action for the sum of $1,400.00, and granting to the plaintiffs judgment thereon with interest as therein prayed for, and declaring that the lien of the plaintiffs attach to the monies heretofore deposited by the former defendant, Ada C. Bottone, with the Clerk of the County of Westchester, pursuant to the aforesaid order of this Court bearing date July 28, 1954, together with the costs and disbursements of Action No. 1, upon the ground that there is no defense thereto, and for such other and further relief as to the Court may seem just and proper.

Please Take Further Notice that you are required to serve answering affidavits, if any, upon the undersigned five days before the return day of this motion.

Dated: Mount Vernon, N. Y., January 21, 1955.

Yours, etc.,

Charles S. Friedman, Attorney for the Plaintiffs, By Harold M. Edwards, of Counsel.

To: All Counsel of Record.

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[fol. 16]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF ROBERT AQUILINO, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

State of New York,
City of Mount Vernon,
County of Westchester—ss.:

Robert Aquilino, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action and makes this affidavit in support of a motion for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice, striking the answer of the defendant United States of America interposed in Action No. 1, above entitled, and granting judgment in favor of the plaintiffs against the defendant United States of America on said answer and in favor of the plaintiffs thereon.

The history and status of the above entitled action is as follows:

On August 25, 1952 plaintiffs entered into a contract in writing with the defendant Fleetwood Paving Corp., wherein and whereby it was agreed that plaintiffs would furnish the labor and material upon certain premises known as Mario's Restaurant at Tuckahoe, New York in rebuilding the front porch, resurfacing the side porch, installing wire lath and cement, installing walls and piers under porch posts, installing steps and flooring for a total contract

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[fol. 17] price of $2,400.00. At the time, Fleetwood Paving Corp. was general contractor on the job, which consisted of remodeling work at said Mario's Restaurant. That thereafter plaintiffs entered upon the performance of their contract and duly completed the same in all respects. That the defendant Fleetwood Paving Corp. paid to the plaintiffs on account of the work done and materials furnished the sum of $1,000.00, but thereafter said defendant failed, neglected and refused to pay to the plaintiffs the balance of said contract price, to wit the sum of $1,400.00, or any part thereof, although payment of said balance of $1,400.00 was duly demanded by the plaintiffs from the defendant Fleetwood Paving Corp.

That Mario's Restaurant, described in said contract, was owned, at the time and at all times thereafter, by one Ada Bottone, who had record title to said premises. That said premises were situate in the Town of Eastchester, Westchester County, New York, and are more particularly described in the complaint in this action, copy of which is annexed to this affidavit and made a part hereof.

That upon the failure of the defendant Fleetwood Paving Corp. to pay to plaintiffs the balance due to plaintiffs under said contract, and on the 3rd day of November, 1952, which was within four months after the final performing of the work and the final furnishing of the materials on said job, plaintiffs filed in the office of the Clerk of the County of Westchester a notice of lien in the form prescribed by the [fol. 18] provisions of the Lien Law of the State of New York, which said notice was in writing and stated the name and residence of the lienors and their business address and principal place of business, the name of the owner of the real property against whose interest therein a lien was claimed and the interest of the owner so far as known to the lienors, the name of the corporation by whom the lienors were employed and to whom they furnished materials, the labor performed and the materials furnished and the agreed price and value thereof, the amount unpaid to the lienors for such labor and materials, the times when the first and last items of work were performed and materials furnished, the property subject to the lien with a description thereof sufficient for identification, together with its location by

street and number. That said notice of lien was duly verified by the plaintiff Robert Aquilino.

That said notice of lien was served upon the said Ada Bottone and Fleetwood Paving Corp. on November 6, 1952 by the service upon them of a copy thereof by registered mail. That said lien has not been paid, waived or discharged.

That thereafter and on the 9th day of June, 1953, an action was instituted by the plaintiffs against Ada Bottone, owner of said Mario's Restaurant, Fleetwood Paving Corp., the general contractor who had employed plaintiffs, and Colonial Sand and Stone Co., Inc., a domestic corporation which had or claimed a lien for materials furnished on the job, and on the 12th day of June, 1953 a notice of the [fol. 19] pendency of said action was duly filed in the office of the Clerk of Westchester County.

That Ada Bottone, the owner of said premises, served an answer by Messrs. Cribari, Scapolito & Solinger, attorneys at law of 100 Stevens Avenue, Mount Vernon, New York, in which said defendant, after denying knowledge or information sufficient to form a belief with respect to the allegations of the complaint, admitted the plaintiffs' lien was filed, and that a copy of said notice of lien was served upon her. She also interposed an affirmative defense in which she alleged that she was indebted to Fleetwood Paving Corp., the general contractor, in the sum of $2,200.00 under her contract with that corporation, but that the United States Government, acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of Ada Bottone and unpaid to the defendant Fleetwood Paving Corp. for unpaid withholding taxes due from the defendant Fleetwood Paving Corp. to the Government. She further alleged that she has no claim on the sum of $2,200.00 remaining unpaid and asked the Court to adjudicate and order payment to such person or persons as may be entitled thereto, stating that she is ignorant of the respective rights of the United States Government and the other parties in the action in and to said monies.

Fleetwood Paving Corp. appeared in said action by notice of appearance dated November 25, 1953, but defaulted in

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pleading, and said defendant has ever since and now is in [fol. 20] default in pleading in said action. That a copy of the answer of the defendant Ada Bottone and of the notice of appearance of the defendant Fleetwood Paving Corp. are hereto annexed and made a part of this affidavit.

That on or about the 9th day of July, 1953, the defendant Colonial Sand and Stone Co., Inc. instituted Action No. 2 above, naming as the original defendants therein Ada Bottone, Mario's Miramare Restaurant, Home Maintenance Co. and Fleetwood Paving Corp. That the said Colonial Sand and Stone Co., Inc. were represented in said action by Jacob I. Goodstein, whose post office address is 21 East 40th Street, New York 16, N. Y.

That the defendant Colonial Sand and Stone Co., Inc. in Action No. 1, being also plaintiff in Action No. 2, appeared in Action No. 1 by the said Jacob I. Goodstein, and ultimately and under date of August 11, 1953, Colonial Sand and Stone Co., Inc. and plaintiffs in Action No. 1 entered into a stipulation wherein and whereby it was agreed that the parties need not serve answers in the two above entitled actions, but that the allegations of each should be deemed denied by the other, and further provided that in the event that either party should move to consolidate said two actions, both agreed to join in the stipulation for such consolidation. A copy of said stipulation is hereto annexed and made a part of this affidavit. That thereafter and by stipulation bearing date May 5, 1954, said two parties further stipulated, by stipulation joined in by Messrs. Cribari, Scapolito & Solinger, attorneys for Ada C. [fol. 21] Bottone and Fleetwood Paving Corp., that said two actions be tried together without consolidation, pursuant to Section 96a of the Civil Practice Act. That a copy of said stipulation is hereto annexed and made a part of this affidavit.

That thereafter and by motion made in both actions by and in behalf of the defendant Ada Bottone, and by order dated July 28, 1954 made by this Court, it was ordered that the said Ada Bottone be permitted to deposit with the Clerk of the County of Westchester the sum of $2,200.00 and that the said Ada Bottone be discharged from liability to either

the plaintiffs in the above two actions or to the United States of America, and that the said sum of $2,200.00 be deposited to the credit of both of the two above entitled actions; and it was further ordered that thereupon the said Ada Bottone be substituted as a defendant in both of said actions by United States of America as defendant. That a copy of said order is hereto annexed and made a part of this affidavit. That thereafter defendant United States of America interposed an answer herein, to which this motion is addressed. A copy of said answer is hereto annexed and made a part of this affidavit.

That deponent is advised and verily believes that the defendant United States of America has at no time filed any notice of its lien against the real property of the defendant Ada Bottone in the Recording Office in Westchester County, where said real property is located, as provided for in Section 240 of the Lien Law of the State of New York. [fol. 22] That as appears from the answer of the defendant United States of America, the said defendant filed a notice of Federal tax liens in the aggregate sum of $5,632.81 in the office of the City Clerk of the City of Mount Vernon upon all property and rights to property belonging to the defendant Fleetwood Paving Corp. That said notice of liens was filed on October 21, 1952. That no levy was made thereon, as appears from said answer, until December 5, 1952, at which time it is alleged that said levy was served on Mario's Miramare Restaurant.

That said levy, if valid, was made subsequent to the date when plaintiffs' notice of lien was duly filed in the office of the Clerk of the County of Westchester, and deponent is informed and verily believes that upon the answer of the defendant United States of America it appears that plaintiff, to the extent of the amount of their lien with interest, is superior to that of the United States of America.

That deponent is informed and verily believes that there is no defense to plaintiffs' cause of action on the part of United States of America and that its answer should be stricken on this motion and judgment entered against the United States of America to the extent of the amount of plaintiffs' claim.

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No previous application for the relief herein sought has been made.

Robert Aquilino

(Sworn to by Robert Aquilino on January 21, 1955.)

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[fol. 23]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

COMPLAINT IN ACTION No. 1, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION No. 1

The complaint of the plaintiffs alleges as follows:

I. That plaintiffs are co-partners doing business under the firm name and style of Home Maintenance Co.

II. Upon information and belief, that the defendant Fleetwood Paving Corp. is a corporation organized under the laws of the State of New York.

III. That at all of the times herein mentioned, the defendant Ada Bottone was and still is the owner of certain lands and premises in the Town of Eastchester, County of Westchester, State of New York more particularly bounded and described as follows:

All that parcel of land, together with the buildings erected thereon, in the Town of Eastchester, County of Westchester and State of New York, etc.—

Beginning at a point on the westerly side of New York Post Road, as widened, and now laid out where the same is intersected by the northerly line of land conveyed by Suburbs Holding Company to Richard L. Treffurth by deed recorded in the office of the County [fol. 24] Clerk, Division of Land Records, formerly Register's Office, Westchester County, N. Y. on June 20, 1911 in Liber 1954 of deeds at page 167; thence running along the northerly line of said land so conveyed by deed as aforesaid; North 60° 05′ 21″ West 398.09 feet to a point of curve being the easterly end of a curve forming part of a Southerly line of Lot 65, Block A, on Map of Leewood Knolls filed in said office on August 8,

1924 as Map Number 2651; thence running westerly along said southerly line of Lot 65, Block A, on said map on a curve to the left tangent to the previous course and having a radius of 20 feet a distance of 24.75 feet to the easterly side of a reserve strip one foot wide lying between the premises hereby described and the easterly side of Park Avenue as laid out on said map and a point of reverse curve; thence running along the easterly side of said reserve strip in a southwesterly direction first on a curve to the right having a radius of 518.42 feet a distance of 43.83 feet and on a curve to the left having a radius of 178.96 feet to a point of tangency; and thence running still along the easterly side of said reserve strip along said tangent South 31° 01′ 15″ West 69.91 feet to the northerly line of land shown on "Map of Westchester Park" filed in said office on November 14, 1906 as Map Number 1672; [fol. 25] thence running along same, North 59° 29′ 27″ East 286.96 feet to the northeast corner of same; thence running along land of Marie C. Treffurth, South 54° 14′ 50″ East 186.84 feet to the westerly side of New York Post Road as widened and now laid out; thence running along said westerly side of New York Post Road East 255.45 feet and North 29° 54′ 39″ East 64.21 feet to the point of beginning.

Said premises are known as No. 561 White Plains Road, Tuckahoe, New York.

IV. Upon information and belief, that heretofore and on a date unknown to plaintiffs, defendant Ada Bottone entered into a contract with the defendant Fleetwood Paving Corp., wherein and whereby the defendant Fleetwood Paving Corp. agreed to funish (sic) all the labor and material necessary for certain remodeling and construction work upon the premises of the defendant Ada Bottone, herein described, and that the defendant Ada Bottone promised and agreed to pay to the defendant Fleetwood Paving Corp. a sum of money, the amount of which is unknown to plaintiffs.

V. Upon information and belief, that the defendant, Fleetwood Paving Corp., entered upon the performance of

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said contract and that at the time of the filing of the notice of lien by the plaintiffs, as herein set forth, had duly performed all of the conditions of said contract upon its part [fol. 26] and had so far completed the same as to become entitled to a payment on account of said contract, and at the time of the filing of said notice of lien there was due and owing to said defendant, Fleetwood Paving Corp., under said contract for work and material furnished a sum in excess of amount of plaintiffs' lien herein.

VI. That heretofore and on or about the 25th day of August, 1952 the plaintiffs entered into a contract with the defendant, Fleetwood Paving Corp., a copy of which is attached hereto, marked Exhibit A and made a part hereof.

VII. That the plaintiffs have duly performed all of the conditions of such contract on their part, but that the defendant, Fleetwood Paving Corp., has paid no part of said sum to the plaintiffs except the sum of $1,000.00 paid on account thereof, leaving a balance of $1,400.00 due and owing to the plaintiffs, no part of which has been paid.

VIII. That the work, labor and services so performed and the materials so furnished by plaintiffs were performed and furnished for the improvement of the real property hereinbefore described and were performed with the knowledge and consent of the defendant, Ada Bottone.

IX. That on the 3rd day of November, 1952 and within four months after the final performing of the work and the final furnishing of the material aforesaid dating from the [fol. 27] last item of work performed and materials furnished, plaintiffs caused to be filed in the office of the Clerk of the County of Westchester, that being the County where the property hereinbefore described is situated, a notice of lien in writing, which notice stated the name and residence of the lienors and their business address and principal place of business; the name of the owner of the real property against whose interest therein a lien is claimed and the interest of the owner so far as is known to the lienors; the name of the corporation by whom the lienor was employed and to whom they furnished the materials; the labor performed and materials furnished and the agreed price and value thereof; the amount unpaid to the lienors

for such labor and materials; the times when the first and last items of work were performed and materials furnished; the property subject to the lien with a description thereof sufficient for identification, together with its location by street and number, which said notice of lien was duly verified by the plaintiff, Robert Aquilino.

X. That thereafter and on or about the 6th day of November, 1952 the plaintiffs caused a copy of said notice of lien to be duly served by registered mail on the defendants.

XI. That said lien has not been paid, waived or discharged, and that no other action or proceeding either at law or in equity has ever been brought to recover the claim of the plaintiffs or any part thereof.

[fol. 28] XII. Upon information and belief, that all of the defendants herein have or claim to have some interest in or lien upon the said premises, which interest or lien, if any, is subsequent and subordinate to plaintiffs' lien, as hereinabove set forth.

XIII. That no persons other than the defendants above mentioned have or claim to have a lien upon said premises to the knowledge of said plaintiffs, nor has any other lien been filed.

Wherefore, the plaintiffs demand judgment that it be adjudged that they have a valid lien on said premises for the sum of $1,400.00; that the equities of the parties to this action and the order of priority of the different liens be adjusted and determined, and that it be adjudged that the plaintiffs have a lien on said premises prior to the interest therein or lien thereon of any of the defendants; that the interest of the defendant, Ada Bottone, in the premises be sold according to law and that from the proceeds of such sale the plaintiffs be paid the amount of their said lien and interest thereon, together with the expenses of such sale and the costs of this action; that the plaintiffs have judgment for any deficiency that may remain after such payment against the defendant Fleetwood Paving Corp.; that the defendants and all persons claiming under or through them be forever foreclosed of all right or equity of redemption or other interest of said premises, and that

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plaintiffs have such other and further relief as to the Court [fol. 29] may seem just and proper with the costs of this action.

Charles S. Friedman, Attorney for Plaintiffs, Office & P. O. Address, 10 Fiske Place, Mount Vernon, N. Y.

(Unverified.)

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EXHIBIT A, ANNEXED TO COMPLAINT IN ACTION No. 1

lOunt Vernon 7-8130

HOME MAINTENANCE Co.
22 West Sandford Boulevard
Mount Vernon, N. Y.

leetwood Paving Co.
8 Columbus Avenue
t. Vernon, N. Y.

August 25, 1952

Re: Mario's Restaurant
Tuckahoe, N. Y.

e agree to furnish labor and material at subject building, per verbal description by owner, for the sum of $2,400.00. ork to consist as follows:

build front porch (approximately 12 x 60).

l. 30] Reservice side porch (approximately 12 x 30), k on wire lath and necessary thickness of cement to ch new floor. Walls to consist of 12" blocks, the piers er porch posts to consist of 12" blocks. Steps to be le up of 12" blocks with cement threads. Floor to consist " concrete (Mixed gravel 1-2-4).

ments to be made as follows:

pon excavation and foots poured
pon completion of walls
nce upon completion

---

alteration or deviation from above involving extra of labor and materials will be executed only upon

written orders for same, and will become an extra charge over the sum mentioned in this contract.

Signed Robert Aquilino Date 8/28/52

Acceptance of Contract

The foregoing terms and conditions are satisfactory and the same are hereby accepted and agreed upon, and you are hereby authorized to execute the same.

Signed H. Cribari Pres. Date 8/28/52

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[fol. 31]

In the Supreme Court of New York
County of Westchester

Answer of Defendant Ada Bottone in Action No. 1, Read in Support of Motion of Plaintiffs in Action No. 1

Defendant Ada Bottone answering the complaint herein, by her attorneys Cribari, Scapolito & Solinger, alleges as follows:

1. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered "VIII" and "XIII".

2. Denies knowledge or information sufficient to form a belief with reference to the allegations of the complaint contained in the paragraphs thereof numbered "VI", "VII" and "XII".

3. Denies each and every allegation of the complaint in paragraph thereof numbered "IX" except that a certain paper writing purporting to be a valid lien was filed.

4. Denies each and every allegation of the complaint contained in paragraph "X" thereof, except that a certain paper writing purporting to be a copy of said notice of lien was served.

For an Affirmative Defense Herein

5. That there has been at all times since the completion of the contract between defendant Ada Bottone and defen

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[fol. 32] dant Fleetwood Paving Corp. due to Fleetwood Paving Corp. the sum of $2200.00 under and pursuant to the terms of the said contract and the said sum now is due and owing to Fleetwood Paving Corp.

6. That on or about the 31st day of October, 1952 and prior to the commencement of this action and prior to the filing of the lien sued on herein, the United States Government acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of defendant, Ada Bottone, and unpaid to defendant Fleetwood Paving Corp. for unpaid withholding taxes due the Government from defendant Fleetwood Paving Corp.

7. That defendant Ada Bottone has no claim upon the sum of $2200.00 remaining unpaid and due to defendant Fleetwood Paving Corp. under the contract heretofore referred to and is willing to pay said sum to such person, persons or agencies as the Court may adjudicate is entitled to payment.

8. Defendant Ada Bottone is ignorant of the respective rights of the plaintiff, the United States Government and the other defendants herein, and cannot determine without hazard to herself to whom to make payment.

Wherefore, defendant Ada Bottone demands judgment dismissing the complaint herein, or in the alternative, ad-[fol. 33] judicating to whom the said monies remaining unpaid on the contract should be paid and upon payment of the same, the mechanic's lien filed by plaintiff herein be discharged of record and defendant Ada Bottone discharged of any further liability and for such other and further relief as the Court may deem just and proper in the premises.

Cribari, Scapolito & Solinger, Attorneys for Defendant Ada Bottone, Office & P. O. Address, 100 Stevens Avenue, Mount Vernon, N. Y.

(Unverified.)

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

COMPLAINT IN ACTION NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

Plaintiff, complaining of the defendants by Jacob I. Goodstein, its attorney, respectfully shows and alleges:

(1) That at all the times hereinafter mentioned, plaintiff was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

[fol. 34] (2) Upon information and belief, that at all the times hereinafter mentioned, the defendant, Fleetwood Paving Corp., was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

(3) That at all the times hereinafter mentioned, the defendant Ada C. Bottone was and still is doing business under the firm name and style of Mario's Miramare Restaurant.

(4) Upon information and belief, that at all the times hereinafter mentioned, Robert Aquilino and Joseph Spero were and still are co-partners doing business under the firm name and style of Home Maintenance Co.

(5) That at all the times hereinafter mentioned, the defendant Ada C. Bottone was and still is the owner in fee of the following described property:

All that parcel of land, together with the buildings erected thereon, in the Town of Eastchester, County of Westchester and State of New York, bounded and described as follows:

Beginning at a point on the westerly side of New York Post Road, as widened, and now laid out where the same is intersected by the northerly line of land conveyed by Suburbs Holding Company to Richard L. Treffurth by deed recorded in the Office of the County [fol. 35] Clerk, Division of Land Records, formerly

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Register's Office, Westchester County, N. Y., on June 20, 1911 in Liber 1954 of Deeds at page 167; thence running along the northerly line of said land so conveyed by deed as aforesaid; north 60 degrees 05′ 21″ West 398.09 feet to a point of curve being the easterly end of a curve forming part of the southerly line of Lot 65, Block A, on "Map of Leewood Knolls" filed in said office on August 8, 1924 as Map Number 2651; thence running westerly along said southerly line of Lot 65, Block A, on said map on a curve to the left tangent to the previous course and having a radius of 20 feet a distance of 24.75 feet to the easterly side of a reserve strip one foot wide lying between the premises hereby described and the easterly side of Park Avenue as laid out on said map and a point of reverse curve; thence running along the easterly side of said reserve strip in a southwesterly direction first on a curve to the right having a radius of 518.42 feet a distance of 43.83 feet and on a curve to the left having a radius of 178.96 feet to a point of tangency and; thence running still along the easterly side of said reserve strip along said tangent South 31 degrees 01′ 15″ West 69.91 feet to the northerly line of land shown on "Map of Westchester Park" filed in said office on November 14, 1906 [fol. 36] as Map Number 1672; thence running along same, North 59 degrees 29′ 27″ East 286.96 feet to the northeast corner of same; thence running along land of Marie C. Treffurth, South 54 degrees, 14′ 50″ East 186.84 feet to the westerly side of New York Post Road as widened and now laid out; thence running along said westerly side of New York Post Road North 29 degrees, 56′ 49″ East 255.45 feet and North 29 degrees 54′ 39″ East 64.21 feet to the point of beginning.

Said premises are known as No. 561 White Plains Road, Tuckahoe, New York.

(6) Upon information and belief, that at all the times hereinafter mentioned, the defendant Ada C. Bottone owned and operated a restaurant in the aforesaid premises known as Mario's Miramare Restaurant.

(7) Upon information and belief, that heretofore and prior to the commencement of this action, the defendant, Fleetwood Paving Corp. (hereinafter referred to as "Contractor") and the defendant, Ada C. Bottone, individually and/or Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant (hereinafter referred to as "Owner") entered into a contract pursuant to the terms of which the Contractor agreed to perform certain labor and furnished certain materials for the construction and improvement of the land and building owned and operated by the Owner for which the Owner agreed to pay [fol. 37] certain sums of money to the said Contractor, the exact amount of which is unknown to this plaintiff.

(8) Upon information and belief, that thereafter the Contractor entered upon the performance of the work on its part to be performed and duly furnished certain materials and performed certain labor which it was required to furnish and perform under the terms and conditions of the contract between it and the Owner and at the time of the filing of this plaintiff's lien, the Contractor had duly performed all the terms and conditions of the said contract on its part to be performed.

(9) Upon information and belief, that during the performance of the said work by the Contractor, the said Contractor performed certain extra work and labor, furnished certain extra material and furnished certain extra equipment which it was required to furnish and perform by the Owner and for which the Owner agreed to pay to the Contractor certain amounts of money, the exact amount of which is unknown to this plaintiff.

(10) Upon information and belief, that a large and substantial sum of money became due and owing to the Contractor from the Owner under and pursuant to the terms of the contract between the said Owner and Contractor and in addition thereto certain sums of money for extra work and labor performed and materials furnished by the said [fol. 38] Contractor to the Owner, the exact amount of which is unknown to this plaintiff, and, upon information and belief, that at the time of the filing of this plaintiff's

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lien, there was a large and substantial sum of money due and owing from the Owner to the Contractor, the exact amount of which is unknown to this plaintiff, and, upon information and belief, the said amount exceeds the amount of this plaintiff's lien as hereinafter set forth.

(11) Upon information and belief, that at the time of the filing of this plaintiff's lien, there was due and owing and there has subsequently become due and owing from the Contractor to the Owner, a large sum of money far in excess of the amount of this plaintiff's lien.

(12) That the said Contractor duly performed all the terms and conditions of the said contract on its part to be performed.

(13) That heretofore and prior to the commencement of this action and between October 2, 1952 and October 8, 1952, both dates inclusive, this plaintiff at the special instance and request of the defendant Contractor, sold and delivered to the said Contractor, materials consisting of stone, ¼ inch Trap Rock and white sand of the agreed price and reasonable value of $896.25, no part of which has been paid although duly demanded.

[fol. 39] (14) That said materials were furnished and delivered by this plaintiff to the Contractor for use in and which became part of the improvement erected and constructed on the premises hereinabove described and which materials were used by the Contractor for the construction of said improvement with the knowledge and consent of the Owner.

(15) That thereafter and on November 10, 1952 and within four months after the furnishing of the last item of material by this plaintiff, this plaintiff duly filed with the County Clerk of Westchester County, a duly verified notice of lien against the premises hereinabove set forth, which notice of lien contained the name and address of this plaintiff, the name of the owner or lessee of the real property hereinabove described against whose interest the lien is claimed, the name of the person to whom the lienor furnished its materials, the materials furnished, the amount unpaid, the time when the first item of material was deliv-

ered, the time when the last item of material was delivered, the property subject to the lien with a description sufficient for identification, which lien duly complied in all respects with the Lien Law of the State of New York for the filing of liens against private improvements, and which lien was duly entered and docketed by the said County Clerk of Westchester County on the 10th day of November, 1952 in the lien docket kept and maintained by him for that purpose.

[fol. 40] (16) That no other action or proceeding at law or in equity has been instituted or is pending for the foreclosure of this plaintiff's lien and that the lien and claim of this plaintiff remains open and undischarged of record, and that the said lien and claim has not been paid, waived, cancelled or discharged.

(17) Upon information and belief, that the defendants Home Maintenance Co. and Fleetwood Paving Corp., have or claim to have some interest in or lien upon the premises hereinabove described, which interests or lien, if any, are subject and subordinate to the lien and claim of this plaintiff.

(18) Upon information and belief, no other persons have or claim to have any subsequent liens or claims against the aforesaid real property by way of mortgage, judgment or otherwise and no persons appear from the records in the office of the County Clerk of Westchester County to have any interest in the said premises other than as herein stated.

(19) That this plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment as follows:

(a) That the Court adjudge and determine the equities, rights and interest of all the parties to this action and determine all the issues raised by the pleadings in this action;

[fol. 41] (b) That the plaintiff be adjudged to have acquired by the filing and docketing of its lien a good, valid and subsisting lien against the said real property for the

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sum of $896.25 with interest thereon from October 25, 1952, together with the costs and disbursements of this action;

(c) That the plaintiff have judgment enforcing the said lien against the said real property, and that it be decreed that the real property herein be sold in accordance with the provisions of law and the rules and practice of this Court and that from the proceeds of said sale there be paid the expenses incident thereto and the costs and disbursements of this action and the lien and claim of this plaintiff with interest from October 25, 1952;

(d) That if the plaintiff for any reason is unable to establish a good, valid and subsisting lien against the real property hereinabove described that it have judgment against the defendants, Fleetwood Paving Corp., Ada C. Bottone and Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant, for the sum of $896.25 with interest thereon from October 25, 1952 besides the costs and disbursements of this action;

(e) That the plaintiff have personal judgment against the defendants, Fleetwood Paving Corp., Ada C. Bottone, Ada C. Bottone doing business under the firm name and style of Mario's Miramare Restaurant, for the amount of its lien and claim with interest, costs and disbursements or [fol. 42] for the amount of any deficiency which may remain unpaid to this plaintiff in the event that the proceeds of said sale are insufficient to pay the lien and claim of this plaintiff with interest, costs and disbursements;

(f) That the defendants and each of them and all persons claiming through or under them or any of them, be forever barred and foreclosed from and of any and all lien, claim, right, title, interest and equity of redemption in and to said property;

(g) That the plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

Jacob I. Goodstein, Attorney for Plaintiff, Office & P. O. Address, 21 East 40th Street, Borough of Manhattan, City of New York.

(Verified by Michael R. Iorio, as Assistant Secretary, on June 3, 1953.)

[fol. 43]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT ADA C. BOTTONE IN ACTION NO. 2 READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

Defendant, Ada C. Bottone, answering the complaint herein by her attorneys, Cribari, Scapolito & Solinger, alleges as follows:

1. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered (9), (18) and (19).

2. Denies each and every allegation of the complaint in the paragraphs thereof numbered (10) and (11) except that there has been at all times since the completion of said work, and there now is due and owing to the contractor by the owner the total sum of $220.00 under and pursuant to the terms of the contract between the owner and the said contractor.

3. Denies knowledge or information sufficient to form a belief with respect to the allegations of the complaint contained in paragraphs thereof numbered (13), (14) and (17).

4. Denies each and every allegation of the complaint contained in paragraphs thereof numbered (15), except that there has been filed a certain paper writing purporting to be a valid lien.

[fol. 44]

For a First Separate and Distinct Defense

5. That heretofore and on or about the 21st day of November, 1952, plaintiff commenced an action against defendant Fleetwood Paving Corp., at law, in the Supreme Court of the State of New York, New York County, to recover the total sum of $2,042.93 which said sum upon information and belief, included the amount of the lien, subject of the within action, and which said law suit in part, upon information and belief, is based upon and arose out of the

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same transaction involved herein and that said action is still pending and undetermined.

As and for a Second Separate and Distinct Defense

6. That on or about the 31st day of October, 1952 and prior to the commencement of this action and prior to the filing of the lien sued on herein, the United States Government acting through the Treasury Department, Internal Revenue Service, filed a lien and levied against the monies remaining in the hands of defendant, Ada C. Bottone, and unpaid to defendant Fleetwood Paving Corp. for unpaid withholding taxes due the Government from defendant Fleetwood Paving Corp.

7. That defendant Ada C. Bottone has no claim upon the sum of $2200.00 remaining unpaid and due to defendant [fol. 45] Fleetwood Paving Corp. under the contract heretofore referred to and is willing to pay said sum to such person, persons or agencies as the Court may adjudicate is entitled to payment.

8. Defendant Ada C. Bottone is ignorant of the respective rights of the plaintiff, the United States Government and the other defendants herein, and cannot determine without hazard to herself to whom to make payment.

Wherefore, defendant, Ada C. Bottone, demands judgment dismissing the complaint herein, or in the alternative, adjudicating to whom the said monies remaining unpaid on the contract should be paid and upon payment of the same the mechanic's lien filed by plaintiff herein be discharged of the record and defendant Ada C. Bottone discharged of any further liability and for such other and further relief as the Court may deem just and proper in the premises.

Cribari, Scapolito & Solinger, Attorneys for Defendant Ada C. Bottone.

(Verified July 14, 1953.)

[fol. 46]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION AS TO ANSWERS IN ACTIONS NO. 1 AND NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1 —August 11, 1953

Whereas, the plaintiff in Action No. 1 instituted said action to foreclose a mechanic's lien filed by it against certain real property owned by the defendant Ada C. Bottone, located in Westchester County; and

Whereas, plaintiffs in Action No. 2 instituted said action to foreclose a mechanic's lien filed by them against certain real property owned by the defendant, Ada Bottone, located in Westchester County; and

Whereas, both lien foreclosure actions affect the same parties and the same real property;

Now, Therefore, it is agreed by and between the undersigned as follows:

1. That the Home Maintenance Co., defendant in Action No. 1 shall serve a notice of appearance upon the attorney for the plaintiff in said Action No. 1, but need not serve an answer in said action and that the allegations contained in the plaintiff's complaint in Action No. 1 shall be deemed denied by the said defendant, Home Maintenance Co.

2. That Colonial Sand & Stone Co., Inc., defendant in Action No. 2, shall serve a notice of appearance upon the [fol. 47] attorney for the plaintiffs in said Action No. 2, but need not serve an answer in said action and that the allegations contained in the plaintiffs' complaint in Action No. 2 shall be deemed denied by the said defendant, Colonial Sand & Stone Co., Inc.

3. That in the event either of the plaintiffs in said actions move to consolidate the said actions the other plaintiff agrees to join in said application and file an affidavit with the Court stating that he joins in the application for a con-

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solidation of said actions and consents to such consolidation.

Dated: New York, N. Y., August 11, 1953.

Jacob I. Goodstein, Attorney for Plaintiff in Action No. 1.

Charles S. Friedman, By Harold M. Edwards, Attorney for Plaintiffs in Action No. 2.

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[fol. 48]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION AS TO CONSOLIDATION, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1—May 5, 1954

It is hereby stipulated and agreed by and between the undersigned that the above entitled actions be tried and heard together, without consolidation pursuant to provisions of Section 96-a of the Civil Practice Act and that an order to that effect may be entered herein by any one of the parties without further notice to any of the other parties herein.

Dated: New York, May 5, 1954.

Jacob I. Goodstein, Attorney for plaintiff in Action No. 1 and defendant in Action No. 2.

Charles S. Friedman, By Harold M. Edwards, Attorney for plaintiff in Action No. 2 and defendant in Action No. 1.

Cribari, Scapolito & Solinger, Attorneys for Ada C. Bottone and Fleetwood Paving Corp., defendants in Actions No. 1 and 2.

[fol. 49]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ORDER OF SUBSTITUTION, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1—July 28, 1954

Present—Hon. Arthur D. Brennan, Justice.

A motion by defendant Ada C. Bottone having been made in both of the above entitled actions, for an order pursuant to Section 287 of the Civil Practice Act, interpleading and substituting the United States of America as defendant in both the above entitled actions, in the place and stead of defendant Ada C. Bottone, and said motion having duly come on for hearing before me,

Now, upon reading and filing the affidavits of Ada C. Bottone, both dated and sworn to June 10, 1954, and the summons and complaint in this action, all in support of the motions, and the affidavit of Harold M. Edwards, sworn to the 28th day of June 1954, consenting to the granting of the said motion in Action #1, and the affidavit of Isidore Zamore, sworn to the 23rd day of June 1954, consenting to the granting of the motion in Action #2, and the United States of America having failed to appear or oppose the [fol. 50] said motions, and the said motions having been submitted to the Court for determination:

Now, on motion of Cribari, Scapolito & Solinger, attorneys for the defendant Ada C. Bottone, in both the above entitled actions, it is,

Ordered, that on payment by defendant Ada C. Bottone to the Clerk of the County of Westchester, of the sum of Two Thousand Two Hundred ($2,200.00) Dollars, within fifteen (15) days from the entry of this order, the United States of America be substituted as defendant in both of the above actions in the place of the defendant Ada C. Bottone, and that said Ada C. Bottone be discharged from liability either to the plaintiffs above named or to the United States of America, and it is further,

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Ordered, that the said sum of Two Thousand Two Hundred ($2,200.00) Dollars be deposited with the Clerk of the County of Westchester to the credit of both of the above entitled actions, and it is further,

Ordered, that the defendant Ada C. Bottone serve upon the United States Attorney for the Southern District of New York, by registered mail, a copy of the order to be entered hereon, with notice of entry thereof, together with a copy of the summons and complaint in each action.

Enter, Arthur D. Brennan, J. S. C.

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[fol. 51]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT UNITED STATES OF AMERICA IN ACTION NO. 1, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

The defendant, United States of America, by its attorney, J. Edward Lumbard, United States Attorney for the Southern District of New York, for its answer to the complaint herein:

I. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI.

II. Denies each and every allegation contained in paragraphs XII and XIII.

As and for a First Separate and Distinct Defense and Cross-Claim, the Defendant, United States of America, Alleges:

III. It is a corporate sovereign body politic.

IV. This defense and cross-claim arises under the Internal Revenue Laws of the United States.

V. Upon information and belief, during December, 1951 the Commissioner of Internal Revenue of the United States

Treasury Department made an assessment of withholding and Social Security taxes in the amount of $4,420.67, plus interest in the amount of $44.03, on the wages paid by [fol. 52] defendant, Fleetwood Paving Corp., of 720 South Columbus Avenue, Mount Vernon, New York, to its employees during the third quarter of the year 1951. $4,109.40 of this assessment has been paid, leaving an unpaid balance of $355.30.

VI. Upon information and belief the assessment list for the assessments alleged in paragraph V was received by Collector of Internal Revenue, District of Albany, New York, on December 27, 1951.

VII. Upon information and belief during March 1952 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and Social Security taxes in the amount of $3,136.87, plus interest in the amount of $31.24, on the wages paid by defendant, Fleetwood Paving Corp., to its employees during the 4th quarter of the year 1951. No part of this assessment has been paid.

VIII. Upon information and belief the assessment list for the assessments alleged in paragraph VII was received by the Collector of Internal Revenue, District of Albany, New York, on March 21, 1952.

IX. Upon information and belief on October 21, 1952 the Collector filed a written notice of Federal Tax Lien(s) under Internal Revenue Laws in the amount of $5,632.81 [fol. 53] in the office of the City Clerk of the City of Mount Vernon wherein liens were claimed on behalf of the United States upon all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments alleged in paragraphs V and VII plus unassessed interest and penalties.

X. Upon information and belief on December 5, 1952 the Collector served a levy in the amount of $6,344.22, representing tax due in the amount of $5,632.81, penalty in the amount of $381.65 and interest in the amount of $329.76, on the defendant, Mario's Miramare Restaurant,

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herein it was notified that all property and rights to roperty belonging to the defendant, Fleetwood Paving orp., and all sums of money owing from Mario's Mira- are Restaurant to Fleetwood Paving Corp. were seized id levied upon. This levy covered the assessments al- ged in paragraphs V and VII.

XI. Upon information and belief the defendant Ada C. ottone, doing business as Mario's Miramare Restaurant, is deposited with the Clerk of the County of Westchester, e sum of $2,200.00 pursuant to an order of this Court tered July 28, 1954 by the Honorable Arthur D. Brennan.

Wherefore, defendant, United States of America, prays:

1. That the Court adjudge and decree that the defen- ol. 54] dant, Fleetwood Paving Corp., is indebted to the fendant, United States of America, in the sum of ,523.41.

2. That the claim of the defendant, United States of nerica, be declared prior to and superior to the claims plaintiff and/or of any of the other defendants herein.

3. That the Court direct the Clerk of the County of estchester to pay to the defendant, United States of nerica, the sum of $2,200.00 now in his hands.

4. That the defendant, United States of America, have h other and further relief as the Court may deem per.

Dated: New York, N. Y., September 28, 1954.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendants.

By J. Donald McNamara, Assistant United States Attorney.

Unverified.)

[fol. 55]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

ANSWER OF DEFENDANT UNITED STATES OF AMERICA IN ACTION NO. 2, READ IN SUPPORT OF MOTION OF PLAINTIFFS IN ACTION NO. 1

The defendant, United States of America, by its attorney, J. Edward Lumbard, United States Attorney for the Southern District of New York, for its answer to the complaint herein:

I. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (1), (2), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18) and (19).

II. Denies each and every allegation contained in paragraph (18).

As and for a First Separate and Distinct Defense and Cross-Claim, the Defendant, United States of America, Alleges:

III. It is a corporate sovereign body politic.

IV. This defense and cross-claim arises under the Internal Revenue Laws of the United States.

V. Upon information and belief, during December, 1951 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and social security taxes in the amount of $4,420.67, plus interest in the amount of $44.03, on the wages paid by [fol. 56] defendant, Fleetwood Paving Corp., of 720 South Columbus Avenue, Mount Vernon, New York, to its employees during the third quarter of the year 1951. $4,109.40 of this assessment has been paid, leaving an unpaid balance of $355.30.

VI. Upon information and belief the assessment list for the assessments alleged in paragraph V was received by Collector of Internal Revenue, District of Albany, New York, on December 27, 1951.

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VII. Upon information and belief during March 1952 the Commissioner of Internal Revenue of the United States Treasury Department made an assessment of withholding and Social Security taxes in the amount of $3,136.87, plus interest in the amount of $31.24, on the wages paid by defendant, Fleetwood Paving Corp., to its employees during the 4th quarter of the year 1951. No part of this assessment has been paid.

VIII. Upon information and belief the assessment list for the assessments alleged in paragraph VII was received by the Collector of Internal Revenue, District of Albany, New York, on March 21, 1952.

IV. (sic) Upon information and belief on October 31, 1952 the Collector filed a written notice of Federal Tax Lien(s) under Internal Revenue Laws in the amount of $5,-[fol. 57] 632.81 in the office of the City Clerk of the City of Mount Vernon wherein liens were claimed on behalf of the United States upon all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments alleged in paragraphs V and VII plus unassessed interest and penalties.

X. Upon information and belief on December 5, 1952 the Collector served a levy in the amount of $6,344.22, representing tax due in the amount of $5,632.81, penalty in the amount of $381.65 and interest in the amount of $329.76, on the defendant, Mario's Miramare Restaurant, wherein it was notified that all property and rights to property belonging to the defendant, Fleetwood Paving Corp., and all sums of money owing from Mario's Miramare Restaurant to Fleetwood Paving Corp. were seized and levied upon. This levy covered the assessments alleged in paragraphs V and VII.

XI. Upon information and belief the defendant, Ada C. Bottone, doing business as Mario's Miramare Restaurant, has deposited with the Clerk of the County of Westchester, the sum of $2,200.00, pursuant to an order of this Court entered July 28, 1954 by the Honorable Arthur D. Brennan.

Wherefore, defendant, United States of America, prays:

1. That the Court adjudge and decree that the defen-
[fol. 58] dant, Fleetwood Paving Corp., is indebted to the defendant, United States of America, in the sum of $3,523.41.

2. That the claim of the defendant, United States of America, be declared prior to and superior to the claims of plaintiff and/or of any of the other defendants herein.

3. That the Court direct the Clerk of the County of Westchester to pay to the defendant, United States of America, the sum of $2,200.00 now in his hands.

4. That the defendant, United States of America, have such other and further relief as the Court may deem proper.

Dated: New York, N. Y., September 28, 1954.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. of A.

By J. Donald McNamara, Assistant United States Attorney.

(Unverified.)

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[fol. 59]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

NOTICE OF CROSS-MOTION OF PLAINTIFF IN ACTION NO. 2

Sirs:

Please Take Notice that upon the annexed affidavit of Michael R. Iorio, duly sworn to the 27th day of January, 1955, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move by way of cross-motion at Special Term, Part I of the Supreme Court, Westchester County, at the Court House, in the City of White Plains, on the 11th day of February, 1955, at 10:00 A. M., or as soon thereafter as counsel can be heard for an order granting Colonial Sand & Stone Co., Inc., the following relief, to wit:

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1. Granting Summary Judgment pursuant to Rule 113 of the Rules of Civil Practice, in favor of Colonial Sand & Stone Co., Inc. for the sum of $896.25, with interest thereon from October 25, 1952.

2. Adjudicating that the lien filed by Colonial Sand & Stone Co. Inc. on November 10, 1952 for the sum of $896.25 with the County Clerk of Westchester County against Ada C. Bottone, owner of the real property described and set forth in the complaints in [fol. 60] the above-entitled actions described as actions 1 and 2, is a good, valid and subsisting lien against the said real property for the sum of $896.25, together with interest thereon from October 25, 1952.

3. That the liens filed by the plaintiffs in both of the above-entitled actions be declared to be superior and prior to the tax liens and claims of the United States of America as asserted in the said defendant's answer and that the said claims of the said defendant, United States of America are subject and subordinate to the liens of the aforesaid plaintiffs.

4. That judgments to be entered herein directing the County Clerk of Westchester County to pay out, distribute and turn over the sum of $2,200.00 deposited with him by the defendant, Ada C. Bottone, pursuant to an order of this Court, pro-rata and without priority to the plaintiffs in actions 1 and 2.

5. For such other and further relief as to the Court may seem just and proper in the premises.

Please Take Further Notice, that you are required to erve answering affidavits, if any, upon the undersigned, fol. 61] five (5) days prior to the return date of this notion.

Dated: New York, N. Y., January 27, 1955.

Yours, etc.,

Jacob I. Goodstein, Attorney for Colonial Sand & Stone Co., Inc.

o: All counsel of record.

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF MICHAEL R. IORIO, READ IN SUPPORT OF CROSS-MOTION OF PLAINTIFF IN ACTION NO. 2 AND IN OPPOSITION TO MOTION OF PLAINTIFFS IN ACTION NO. 1

City, State and County of New York—ss.:

Michael R. Iorio, being duly sworn, deposes and says:

I am Assistant Secretary of Colonial Sand & Stone Co., Inc.

This affidavit is submitted both in support of the annexed motion by Colonial Sand & Stone Co., Inc. and in opposition to the motion by the plaintiffs in Action No. 1. [fol. 62] The facts relating to the above-entitled actions are as follows:

Between October 2, 1952 and October 8, 1952, both dates inclusive, Colonial Sand & Stone Co., Inc., (hereinafter referred to as "Colonial"), at the special instance and request of Fleetwood Paving Corp., (hereinafter referred to as "Fleetwood"), sold and delivered to Fleetwood materials consisting of stone, trap rock and cinders of the agreed price and reasonable value of $896.25. Said materials were furnished and delivered to Fleetwood for use in and which became part of the construction of the public improvement being constructed by Fleetwood for Ada C. Bottone, owner of the premises, more particularly set forth and described in Paragraph Fifth of Colonial's complaint in Action No. 2.

Upon Feetwood's failure to pay Colonial the aforesaid sum of $896.25, Colonial, on November 10, 1952 and within four (4) months after the furnishing of the last item of material, duly filed with the County Clerk of Westchester County, a duly verified notice of lien against Ada C. Bottone, as owner and Fleetwood, as Contractor, against the premises involved in these actions and said notice of lien duly complied in all respects with the Lien Law of the State of New York, relating to the filing of Mechanic's Liens against private improvements and said notice of lien was duly docketed and entered by the County Clerk of Westchester County on November 10, 1952 in the Lien Docket kept and maintained by him for that purpose.

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[fol. 63] On November 12, 1952 copies of said notice of lien were duly served by Registered Mail on the owner, Ada C. Bottone and the Contractor, Fleetwood.

On June 4, 1953 Colonial, as plaintiff, instituted an action in this Court to foreclose its said Mechanic's Lien and on the same day, to wit, June 4, 1953 it filed a Lis Pendens and the original Summons and Verified Complaint with the County Clerk of Westchester County.

Copies of the summons and complaint were served on Ada C. Bottone and Mario's Miramare Restaurant on July 8, 1953 and on the plaintiffs Aquilino and Spero, doing business as Home Maintenance Co., on July 9, 1953. The defendant, Fleetwood served an appearance and demand which was received by our attorney on May 4, 1954. Said defendant, Fleetwood, defaulted in serving its answer and its time to do so has expired and no extension of time was ever granted to said defendant, by our attorney or by any order of this Court.

The owner, Ada C. Bottone, served an answer which was received by our attorney on July 16, 1953 in which the owner set up as an affirmative defense the assertion by the United States of America of its tax claim and lien.

The owner and Fleetwood both appeared by Cribari, Scapolito & Solinger, Esqs., of 100 Stevens Avenue, Mount Vernon, New York.

The Home Maintenance Co. served an appearance which was received by our attorney on August 17, 1953 and ap-

[fol. 64] peared by their attorney, Charles S. Friedman of 0 Fiske Place, Mount Vernon, New York.

After the institution of Action No. 2, Colonial was served n July 15, 1953 with a copy of a summons and complaint n Action No. 1. Colonial served a notice of appearance nd demand in said Action No. 1 on August 11, 1953 and ppeared by our attorney, Jacob I. Goodstein of 21 East 0th Street, New York 16, N. Y.

On August 11, 1953 the attorney for the plaintiffs in the bove-entitled actions entered into a stipulation dated Au- ust 11, 1953, a copy of which is annexed to the motion apers of the plaintiff in Action No. 1, pursuant to the erms of which the plaintiffs agreed that they need not erve any answers to each others complaint.

Thereafter, Ada C. Bottone, who had been named as a defendant in both of the above-entitled lien foreclosure actions made a motion for an order, pursuant to Section 287 of the Civil Practice Act interpleading and substituting the United States of America as a defendant in said actions in her place and stead, upon depositing with the County Clerk of Westchester County the sum of $2,200.00. On July 28, 1954 an order was signed and entered by Hon. Arthur D. Brennan, one of the Justices of this Court, granting the motion by Ada C. Bottone and directing that upon her depositing $2,200.00 with the County Clerk of Westchester County, she shall be discharged from liability to the lienors or the Government and that the United States of America was substituted as a defendant in both actions in the place of the defendant, Ada C. Bottone.

[fol. 65] Thereafter and on September 30, 1954 our attorney received from the United States' attorney a copy of an answer on behalf of the defendant, United States of America.

On May 5, 1954 the attorneys for the plaintiffs in the above-entitled lien foreclosure action and the attorneys for the defendant, Fleetwood, entered into a stipulation providing that the above-entitled actions be tried and heard together without consolidation, pursuant to the provisions of Section 96-a of the Civil Practice Act, and on May 17, 1954 Hon. Frank H. Coyne, one of the Justices of this Court, signed and entered an order directing that the above-entitled lien foreclosure actions be tried and heard together, in accordance with the provisions of Section 96-a of the Civil Practice Act.

The aforesaid lien and claim of Colonial has not been paid, waived, cancelled, satisfied or discharged.

The question to be decided in the above-entitled actions is who is entitled to priority as between the lienors and the Government. If the lienors are entitled to priority then they are entitled to share pro rata the $2,200.00 deposited by owner, Ada C. Bottone, with the County Clerk of Westchester County.

Section 13 Subdivision I of the Lien Law of the State of New York provides that " * * * persons shall have no priority on account of the time of filing their respective

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notices of liens, but all liens shall be on a parity * * * ".
[fol. 66] We also call the Court's attention to the following pertinent facts:

On July 8, 1952 Ada C. Bottone acquired title to the premises involved in the above-entitled actions by deed from Agatha M. Dumas and Florence Catillag, dated July 7, 1952 and recorded in the office of the County Clerk of Westchester County on July 10, 1952 in Liber 5115 of Conveyances, Page 163.

The claims of the defendant, United States of America hereinafter referred to as "Government" as asserted in its answer, arose out of the filing of two different assessment lists with the Collector of Internal Revenue in and for the District of Albany, State of New York. The first assessment list was received by the said Collector on December 27, 1951 for the sum of $4,420.67 plus interest in the sum of $44.03. The second assessment list was received by the said Collector on March 21, 1952 in the sum of $3,136.87, plus interest in the sum of $31.24. The Government in its answer alleges that it received on account of its assessment on December 27, 1951 the sum of $4,109.40. It further alleges that on October 31, 1952 it filed a tax lien for the sum of $5,632.81 in the office of the said Clerk of the City of Mount Vernon which tax lien covered the assessments hereinabove referred to.

It is to be noted that at the time the Government made and filed its assessment lists with the Collector of Internal Revenue, Ada C. Bottone had not yet purchased or acquired title to the real estate involved in this action.

[fol. 67] It was not until sometime after July 7, 1952 that Ada C. Bottone contracted with Fleetwood, pursuant to the terms of which Fleetwood agreed to make certain improvements to the real property involved in this action and it was not until after July 7, 1952 (when Ada C. Bottone became the owner of the said real property) that Fleetwood performed any labor or furnished any materials or that the lienors herein performed labor or furnished materials for the improvement of the aforesaid real property.

Between August 7, 1952 and October 8, 1952 Colonial sold and delivered materials for various jobs to Fleetwood amounting to $2,042.93. Thereafter it instituted an action

in the Supreme Court, Westchester County against Fleetwood for the said amount and on January 8, 1953 Colonial received a judgment against Fleetwood which was entered in the Office of the County Clerk of Westchester County, on January 8, 1953 for the sum of $2,109.43.

With respect to the lien of Colonial for the sum of $896.25 the original delivery tickets signed by representatives of Fleetwood at the time the said materials were delivered to the real property involved in this action will be exhibited to the Court on the argument of this motion, and are referred to and made part hereof as if fully and at length set forth herein.

The owner, Ada C. Bottone, was at the time of the filing of the Mechanic's Liens and the Government's Tax Liens, a resident of Pelham Manor and resided at 1075 Pelhamdale [fol. 68] Avenue, Pelham Manor, New York. The real property involved in this action was and still is located in the Town of Eastchester, Westchester, New York.

In view of the Government's failure to comply with the provisions of Section 240 of the Lien Law of the State of New York, in that it failed to file its tax lien with the County Clerk of Westchester County, the Government's Lien is subject and subordinate to the Mechanic's Liens filed by the plaintiffs in the above-entitled actions.

Wherefore, Colonial Sand & Stone Co., Inc. asks that it be granted the relief prayed for in the annexed notice of motion, for which no previous application has been made.

Michael A. Iorio

(Sworn to by Michael A. Iorio on January 27, 1955.)

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In the Supreme Court of New York
County of Westchester

Notice of Cross-Motion of Defendant United States of America in Actions No. 1 and No. 2

Sirs:

Please Take Notice that upon the pleadings herein and the affidavit of J. Donald McNamara, duly sworn to February 11, 1955 and on the papers heretofore filed, and proceedings heretofore had herein, defendant, United States [fol. 69] of America, will make a cross-motion at Special Term Part I of the Supreme Court, Westchester County, at the Court House in the City of White Plains, on the 16th day of February, 1955 at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order granting summary judgment to defendant, United States of America, pursuant to Rule 113 of the Rules of Civil Practice, on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Dated: New York, N. Y., February 11, 1955.

Yours, etc.,

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, United States of America.

To: All Counsel of record.

[fol. 70]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

AFFIDAVIT OF J. DONALD MCNAMARA, READ IN SUPPORT OF CROSS-MOTION OF DEFENDANT UNITED STATES OF AMERICA IN ACTIONS NO. 1 AND NO. 2

State of New York,
County of New York—ss.:

J. Donald McNamara being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney, in the Office of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for defendant United States of America; that he is familiar with the facts of this matter; and that he is authorized to make this affidavit.

2. Deponent makes this affidavit in support of the cross-motion for summary judgment of defendant, United States of America.

3. On December 27, 1951, the Collector of Internal Revenue, Albany District, received an assessment of withholding taxes, plus interest, based on wages paid by defendant Fleetwood Paving Corp., Mount Vernon, New York, in the amount of $4,464.70 from the Commissioner of Internal Revenue, United States Treasury Department.

[fol. 71] 4. On March 21, 1952, the Collector of Internal Revenue, Albany District, received an assessment of withholding taxes, plus interest, based on wages paid by defendant, Fleetwood Paving Corp., Mount Vernon, New York, in the amount of $3,168.11 from the Commissioner of Internal Revenue, United States Treasury Department.

5. Attached hereto and made a part hereof is a certified copy of Certificate of Assessments and Payments, Treasury Department Form 899, marked Exhibit "A", which shows an unpaid balance due on taxes and interest owed by Fleetwood Paving Corp., in the sum of $3,523.41.

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6. On October 31, 1952, the Collector of Internal Revenue, Albany District, filed a written Notice of Federal Tax Lien(s) under Internal Revenue Laws, in the amount of $5,632.81 in the office of the City Clerk of the City of Mount Vernon, New York, wherein liens were claimed on behalf of the United States on all property and rights to property belonging to the defendant, Fleetwood Paving Corp. These liens covered each of the assessments referred to above in paragraphs 4 and 5, plus unassessed interest and penalties.

7. Attached hereto and made a part hereof is a certified copy of Notice of Federal Tax Lien(s) under Internal Revenue Laws, Treasury Department Form 668, marked Exhibit "B", which was filed with the City Clerk of the City of Mount Vernon, New York.

[fol. 72] 8. Accordingly, pursuant to Title 26, United States Code, Sections 3670, 3671 and 3672, the claim of defendant, United States, is first in time and, therefore, first in priority.

Wherefore, defendant United States respectfully requests that an order be entered granting summary judgment to it and directing the County Clerk, County of Westchester, to pay over to it the sum of $2200.

J. Donald McNamara, Assistant U. S. Attorney.

(Sworn to by J. Donald McNamara on February 11, 1955.)

EXHIBIT "A", ANNEXED TO AFFIDAVIT OF J. DONALD MCNAMARA

Certified copy of Certificate of Assessments and Payments, Treasury Department Form 899.

(See Opposite) ☞

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Form 809
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Exhibit "A", Annexed to Affidavit of J. Donald McNamara

# CERTIFICATE OF ASSESSMENTS AND PAYMENTS

OFFICE OF Director OF INTERNAL REVENUE
Albany, N. Y.
DISTRICT OF ....

In re: Fleetwood Paving Corp.
(Name of taxpayer)
720 So. Columbus Ave.
Mt. Vernon, N.Y.

TO THE COMMISSIONER OF INTERNAL REVENUE:
ATTENTION:
(Refer to symbols and date of letter requesting this certification)

The following is a transcript of the records of this office covering the accounts of the taxpayer named above in respect to WFT
(Character of tax)
for the 9/30 and 12/31/51
(Period covered)

| 1. Tax-able Period | 2. Law and Year | 3. Asst. No. or Page and Line | 4. Amount Assessed | | 5. Date of Payment or Check No. | 6. Amount | | 7. Pay. Ac. Cr. | 8. Assessments or Overassessments |
|---|---|---|---|---|---|---|---|---|---|
| 9/30/51 | 12/51 | 5670 | T 4420 | 67 | 7/10/52 | 1000 | 00 | Pd | Bal. $355.30 ✓ |
| | | | I 44 | 03 | 10/8/52 | 500 | 00 | " | 23C 12/27/51 |
| | | | | | 11/5/52 | 500 | 00 | " | 17 1/10/52 |
| | | | | | 5/18/53 | 2109 | 40 | " | 21 2/8/52 |
| | | | | | | | | | 69 #2701535 4/1/52 |
| | | | | | | | | | 668 10/31/52 |
| 12/31/51 | 3/52 | 6390 | T 3136 | 87 | | | | | Bal. $3168.11 ✓ |
| | | | I 31 | 24 | | | | | 23C 3/21/52 |
| | | | | | | | | | 17 4/9/52 |
| | | | | | | | | | 21 5/14/52 |
| | | | | | | | | | 69 #2703459 6/13/52 |
| | | | | | | | | | 668 10/31/52 |

I CERTIFY that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds pertaining thereto as disclosed by the records of this office, are shown therein.

Date of certificate July 21, 1953, 19

Director Collector of Internal Revenue

C:AB:MSP

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[fol. 74]

EXHIBIT "B", ANNEXED TO AFFIDAVIT OF J. DONALD MCNAMARA

September 29, 1954

Pursuant to the provisions of Section 1733, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States) I hereby certify that annexed is a true copy of notice of Federal Tax lien #9155, filed by this office, the Albany District of New York, in the office of the City Clerk, Mt. Vernon, N. Y., on the 31st day of October, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed on the day and year first above written.

R. J. RATTERREE
District Director of Internal Revenue

(Seal)

(See Opposite) ☞

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Exhibit "B", Annexed to Affidavit of J. Donald McNamara

Form 668
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised Nov. 1952

No. 9155

# NOTICE OF FEDERAL TAX LIEN(S) UNDER INTERNAL REVENUE LAWS

COPY
ed

UNITED STATES INTERNAL REVENUE,

Albany, N.Y. DISTRICT

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit: Personal Property

Name of taxpayer Fleetwood Paving Corp.

Residence or place of business Carleton Avenue
Mt. Vernon, New York

| NATURE OF TAX | YEAR OR TAXABLE PERIOD | DATE ASSESSMENT LIST RECEIVED | AMOUNT OF ASSESSMENT |
|---|---|---|---|
| Withheld Federal | 9/30/51 | 12/27/51 | $ 2464.70 |
| Withheld Federal | 12/31/51 | 3/21/52 | 3168.11 |
| | | | |
| | | | |
| | | | |
| | | TOTAL | $ 5632.81 |

WITNESS my hand at Albany, New York, on this,

the 29th day of October, 1952

(signed) R. J. Batterree
Director of Internal Revenue.

City Clerk
Mt. Vernon, New York

By
Internal Revenue Agent.

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien(s). G. C. M. 26419, 1950-1 C. B., 125.)

16-67420-6

[fol. 76]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

OPINION OF BRENNAN, *J.*

In the above actions brought to foreclose two mechanic's liens affecting the same premises, each of the parties appearing therein (other than the general contractor who has defaulted in pleading) has moved for summary judgment.

There appear to be no triable issues of fact present. It is conceded that Home Maintenance Company, a subcontractor, has a valid lien for $1,400 and that Colonial Sand & Stone Co., Inc., a materialman, has a valid lien for $896.25. In addition, it is not disputed that Ada Bottone, the owner of the subject premises, owed a balance of $2,200 to the general contractor, Fleetwood Paving Corporation, and said owner has paid said balance into court to the credit of these actions.

The sole question presented is whether the aforesaid subcontractor and materialman who filed their respective liens on November 3, 1952, and on November 10, 1952, are entitled to their proportionate shares of the said fund now on deposit or whether the interpleaded defendant, United States of America, is entitled to said deposit by virtue of certain federal withholding assessments and liens owed by the general contractor, Fleetwood Paving Corporation, on which there remains an unpaid balance of $3,523.41. These assessments were made during December of 1951, and March of 1952; notice of said liens was filed on October 31, 1952, in the office of the City Clerk of the City of Mount Vernon, N. Y. (in which city the general contractor maintained its office); and on December 5, 1952, a levy based [fol. 77] on said tax liens was served on the owner, Bottone. At no time were said tax liens filed in the office of the Clerk of Westchester County, in which county the subject real property is located. The federal government contends that its aforesaid tax liens have priority over and are superior to the mechanic's liens of the aforementioned subcontractor and materialman and that it is therefore entitled to the fund on deposit herein.

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In this court's view, the situation presented at bar is governed by the rule laid down in *Cranford Company* v. *L. Leopold & Company* (189 Misc., 388, 70 N. Y. Supp., 2d, 183, aff'd 273 App. Div., 754, 75 N. Y. Supp., 2d, 512, aff'd 298 N. Y., 676). In the cited case, involving a public improvement, it was held that moneys due and payable for such an improvement are a trust fund for the payment of the proper expenses of construction; that a mechanic's lien attaches to the debt; and that a mechanic's lienor is, to the extent of his interest, a statutory assignee and is protected unless and until notice of the tax lien of the United States is filed in the proper office. The careful reasoning of the *Cranford* case has recently been followed in *Bain* v. *Caruso-Sturcey Corporation* (134 N. Y., Supp., 2d, 246 [involving a public improvement]), and in *United States* v. *Preferred Contractors* (122 Fed. Supp., 219 [involving a private improvement]). In the light of the present provisions of sections 36-a, 13(7) and 56 of the Lien Law, this court holds that the rule in the Cranford case applies, with equal force, to a private improvement. Fur-
[fol. 78] ther, this court holds that the instant tax liens of the government, in order to be effective against the subject realty and the moneys due for the improvement thereof were, under the provisions of section 3672 of the Internal Revenue Code and section 240 of the Lien Law, required to be filed in the Office of the Clerk of Westchester County. Since the government's liens were not filed in said county clerk's office and the liens of the subcontractor and the materialman were filed in that office, it follows that the two last mentioned liens (which, as stated above, exceed the balance due from the owner) are superior to the tax liens.

Accordingly, the motion of the subcontractor and the cross-motion of the materialman are granted and the cross-motion of the government is denied. The subcontractor and the materialman shall share, pari passu, in the fund on deposit.

Settle order and judgment on notice.

[fol. 79]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

STIPULATION WAIVING CERTIFICATION—October 26, 1955

It Is Hereby Stipulated and Agreed that the foregoing are true and correct copies of the notice of appeal, order and judgment appealed from and all the papers used before the Court below in making the order and judgment appealed from herein and the whole thereof which are on file in the Office of the Clerk of the Supreme Court, Westchester County, and certification of same is hereby waived pursuant to Section 170 of the Civil Practice Act.

Dated, October 26, 1955.

Paul W. Williams, United States Attorney, Attorney for Defendant-Appellant.

Charles S. Friedman, Attorney for Plaintiffs-Respondents in Action No. 1 and Defendant-Respondent in Action No. 2.

Jacob I. Goodstein, Attorney for Defendant-Respondent in Action No. 1 and Plaintiff-Respondent in Action No. 2.

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[fol. 81]

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

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Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

FLEETWOOD PAVING CORPORATION, Defendant,

—and—

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

---

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

—against—

UNITED STATES OF AMERICA, Defendant-Appellant,

—and—

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

—and—

HOME MAINTENANCE COMPANY, Defendant-Respondent.

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NOTICE OF APPEAL TO COURT OF APPEALS

Sirs:

Please Take Notice that pursuant to the leave granted by the Court of Appeals of the State of New York in both [fol. 82] Action No. 1 and Action No. 2 above, by an order duly made and entered in the office of the Clerk of that

Court on the 29th day of November, 1956, the United States of America, Defendant-Appellant, in both Action No. 1 and Action No. 2 above, hereby appeals to the Court of Appeals from each and every part of the order of the Appellate Division, Second Department, duly entered in the office of the Clerk of the Appellate Division, Second Department, on the 2nd day of July, 1956, affirming an order and judgment (one paper) of the Supreme Court, County of Westchester, duly entered in the office of the Clerk of the County of Westchester on the 28th day of March, 1955.

Dated: New York, N. Y., December 28, 1956.

Yours, etc.,

Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for Defendant-Appellant, United States of America, Office & Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

[fol. 83] To: Jacob I. Goodstein, Esq., Attorney for Defendant-Respondent and Plaintiff-Respondent, Colonial Sand and Stone Co., Inc., Office & Post Office Address: 21 East 40th Street, New York 16, N. Y.

Charles S. Friedman, Esq., Attorney for Plaintiffs-Respondents and Defendants-Respondents, Robert Aquilino and Joseph Spero, co-partners doing business as Home Maintenance Co., Office & Post Office Address: 10 Fiske Place, Mount Vernon, N. Y.

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[fol. 84]

IN COURT OF APPEALS

ORDER OF COURT OF APPEALS GRANTING LEAVE TO APPEAL—November 29, 1956

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Mo. No. 469

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

and another action

---

[fol. 85] A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy

Gearon Kimball, Deputy Clerk.

(Seal)

[fol. 86]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

ORDER OF APPELLATE DIVISION DENYING LEAVE TO APPEAL—August 13, 1956

Present—Hon. Gerald Nolan, Presiding Justice. Hon. Charles E. Murphy, Hon. Henry L. Ughetta, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

---

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(Action No. 1)

---

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

and

HOME MAINTENANCE COMPANY, Defendant-Respondent.

(Action No. 2)

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fol. 87] The above named United States of America, the efendant-appellant in the above entitled Actions No. 1 nd 2, having made a motion for leave to appeal to the ourt of Appeals; and the motion having been duly sub-itted.

Now on reading and filing the papers in support of and opposition to said motion; and all the papers upon hich the appeal was heard; and due deliberation having een had thereon:

It is Ordered that the said motion be and the same hereby denied.

Enter:

John J. Callahan, Clerk.

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Notice of Entry

r:—

Please take notice, that the within is a copy of an order is day duly entered herein and filed in the office of the erk of the Appellate Division, Second Department.

Dated, Mt. Vernon, N. Y., August 13, 1956.

Yours, etc.,

Harold M. Edwards, Attorney for Respondent, Office and Post Office Address, 10 Fiske Place, Mount Vernon, N. Y.

To: Paul W. Williams, Esq., United States District torney, United States Court House, Foley Square, New rk, N. Y.

[fol. 88]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

ORDER APPEALED FROM—July 2, 1956

Present—Hon. Gerald Nolan, Presiding Justice. Hon. Henry G. Wenzel, Jr., Hon. Charles E. Murphy, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

---

ROBERT AQUILINO and JOSEPH SPERO, co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(Action No. 1)

---

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

and

HOME MAINTENANCE COMPANY, Defendant-Respondent.

(Action No. 2)

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[fol. 89] The above named, United States of America, defendant in the above entitled actions No. 1 and 2, having appealed to the Appellate Division of the Supreme Court from an order and judgment (one paper) of the Supreme Court, entered in the office of the Clerk of the County of Westchester on the 28th day of March, 1955, granting motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying cross motion of said defendant, United States of America for summary judgment; striking out the answers of said defendant, and adjudging that the plaintiffs in Action No. 1 have a valid lien for the sum of $1400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund for the sum of $896.25, etc., herein, and the said appeal having been argued by Mr. Maurice N. Nessen, Assistant United States Attorney, of Counsel for defendant-appellant United States of America, and argued by Mr. Harold M. Edwards of Counsel for plaintiffs-respondents Aquilino and Spero, and argued by Mr. Isidore Zamore of Counsel for defendant-respondent and plaintiff-respondent Colonial Sand and Stone Co., Inc., and due deliberation having been had thereon; and upon the opinion [fol. 90] and decision slip of the Court herein, heretofore filed:

It is Ordered and Adjudged that the order and judgment (one paper) so appealed from, be and the same hereby is unanimously affirmed, without costs.

Enter:

John J. Callahan, Clerk.

[fol. 91]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

OPINION OF APPELLATE DIVISION

By Nolan, P.J.; Wenzel, Murphy, Hallinan and Kleinfeld, JJ.

*Aquilino, &c., plf-res,* v. *United States, ap* (*Fleetwood Paving Corp'n, def; Colonial Sand & Stone Co., Inc., def-res; Action No. 1*); *Colonial Sand & Stone Co., Inc., plf-res,* v. *United States, ap* (*Mario's Miramare Restaurant and ano., def; Home Maintenance Co., def-res; Action No. 2*)—In two actions brought respectively by respondents Aquilino and Spero, co-partners, and Colonial Sand & Stone Co., Inc., to foreclose mechanics' liens against real property owned by one Ada Bottone, named as a defendant therein, the appeal is by the United States of America from an "order and judgment," which granted motions made by respondents for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice, denied the cross-motion of appellant for summary judgment, and directed the county clerk of Westchester County to pay over to respondents the money deposited by Bottone to discharge the liens against her property, pursuant to section 20 of the Lien Law.

Order and judgment unanimously affirmed, without costs.

Respondents are sub-contractors who contracted with defendant Fleetwood Paving Corporation, the general contractor, to furnish labor and materials for the improvement of the real property owned by Bottone. It is conceded that by the filing of their respective notices of mechanic's liens they acquired valid liens against the real property to the [fol. 92] extent of the amount earned by, and unpaid to, Fleetwood. It was not disputed that Bottone owed a balance of $2,200 to Fleetwood which she deposited in court to the credit of the actions. Appellant is the holder of liens against the property of Fleetwood by virtue of assessments for unpaid Federal taxes. Fleetwood had withheld wages from its employees for taxes, but had failed to turn over the money to the government. The assessments against Fleet-

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wood were included in lists received in the office of the director of Internal Revenue, District of Albany, prior to the time when Fleetwood contracted with Bottone and, of course, prior to the time when Fleetwood was the owner of any claim against Bottone. A notice of federal tax lien was filed by appellant against Fleetwood in the office of the clerk of the City of Mount Vernon, prior to the time when respondents' notices of lien were filed, but after respondents had funished (sic) labor and material for the improvement of the real property involved. By the order and judgment appealed from priority was given to respondents' liens against the real property of Bottone, over the liens of appellant, which it was asserted attached to the debt owed by Bottone to Fleetwood. Appellant claimed no lien against the real property involved, nor against any property of respondents. The rationale of the determination at Special Term is that respondents, by virtue of their respective notices of lien, became statutory assignees of Bottone's indebtedness to Fleetwood and were protected [fol. 93] against the lien asserted by appellant until its notice of lien was filed in the proper office, which was held to be the office of the clerk of the County of Westchester. While it may be doubtful that appellant would have acquired any greater rights, or any rights whatever, by filing a notice of lien in the county clerk's office, since it had, and claimed, no lien against real property (Lien Law, sec. 240) or that respondents were, in a strict legal sense, the assignees of the indebtedness of Bottone to Fleetwood, we do not find it necessary to determine those questions. It may be assumed that appellant's notice of lien was properly filed, if indeed any filing was necessary as against respondents, or at least against respondents Aquilino and Spero, who are not judgment creditors (U. S. Code, tit. 26, secs. 3670, 3671, 3672, subdiv. [a]) and that its lien attached, as it asserts, to the debt owed by Bottone to Fleetwood. However, no such indebtedness existed when the assessment lists were received by the collector and, when the indebtedness now claimed by appellant arose, it was based upon labor performed and material furnished by respondents. In our opinion, there is, at present, no debt due from Bottone to Fleetwood, to which appellant's lien may attach.

When respondents furnished labor and material for the improvement of Bottone's property with her consent, and thus enhanced its value, they acquired an interest therein to the extent of the value of the labor and materials furnished, subject to the limitation provided by section 4 of the Lien Law and, by filing their notices of lien, perfected [fol. 94] their inchoate rights to such interest (see *John P. Kane Co.* v. *Kinney*, 174 N. Y., 69, 73; *Schaghticoke Powder Co.* v. *The Greenwich & Johnsonville R'y Co.*, 183 N. Y., 306, 310; *Rapid Fireproof Door Co.* v. *Largo Corp'n*, 243 N. Y., 482, 486). Having commenced actions to enforce their liens, they are entitled to judgment thereon, pursuant to the provisions of the Lien Law. Section 56 of that statute provides that any judgment rendered in an action to enforce such a lien shall provide for payment to the lienor out of the proceeds of sale of real property, before any part of the proceeds shall be paid to the person for whom the lienor had performed labor or furnished materials. The funds deposited by Bottone were in this case substituted for her property, and must be distributed by the judgment in the same manner as if they were the proceeds realized on its sale. Appellant had no lien against the real property involved, nor does it have any lien upon the funds deposited in substitution therefor. Were it not for appellant's lien against the debt owed by Bottone to Fleetwood, Fleetwood would be entitled only to the balance of the money on deposit, after payment of the amounts necessary to discharge respondents' liens. Appellant, under the circumstances disclosed, is in no better position than Fleetwood would have been, if its right to recover against Bottone had not been subjected to appellant's lien.

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[fol. 95]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS

It Is Hereby Stipulated and Agreed pursuant to Section 170 of the Civil Practice Act that the foregoing are true and correct copies of the Record on Appeal to the Appellate Division, Second Department, the Notice of Appeal to Court of Appeals, the Order of Court of Appeals granting leave to appeal, the Order of Appellate Division denying leave to appeal, the Order of Appellate Division appealed from, and the Opinion of Appellate Division.

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[fol. 98]

IN THE COURT OF APPEALS OF NEW YORK

Robert Aquilino et al., Copartners Doing Business under the Name of Home Maintenance Co., Respondents, v. United States of America, Appellant, et al., Defendant, and Colonial Sand and Stone Co., Inc., Respondent. (Action No. 1.)

Colonial Sand and Stone Co., Inc., Respondent, v. United States of America, Appellant, et al., Defendants, and Home Maintenance Company, Respondent. (Action No. 2.)

Argued October 10, 1957; Decided December 5, 1957.

OPINION OF THE COURT OF APPEALS

Fuld, J. This appeal, here by our permission, involves he relative priority between a mechanic's lien and a federal ax lien.

Fleetwood Paving Corporation owes the United States Government a sum of money representing unpaid withholding and social security taxes. In December, 1951 and March, 952, the local collector received assessment lists including ssessments against the taxpayer. Some short time later, Fleetwood, as general contractor, entered into an agreeent with one Ada Bottone to remodel a restaurant which he owned in the Town of Eastchester. Thereafter, in

August and September of that same year, 1952, Fleetwood arranged for Home Maintenance Company and Colonial Sand and Stone Company to furnish labor and materials for the remodeling job.

On October 31, 1952, the United States filed a lien against Fleetwood for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the clerk of the City of Mt. Vernon, where Fleetwood maintained its place of business. Some days later, having been paid only a part of what was due them, Home Maintenance and Colonial Sand filed mechanic's liens in the county clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January, 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of Fleetwood jobs.

[fol. 99] In June, 1953, separate suits were started by Home Maintenance and Colonial Sand to foreclose their respective liens and Bottone deposited $2,200, the amount still owing by her to Fleetwood, with the county clerk to the credit of both actions. On Bottone's motion, the government, which had levied against her indebtedness to Fleetwood, was interpleaded and substituted as defendant in her place.

Each of the three parties, the two plaintiffs and the government, moved for summary judgment under rule 113 of the Rules of Civil Practice. The court at Special Term granted plaintiffs' motions on the ground that the government's tax lien was ineffective since it had not been filed in the county clerk's office, the place designated by statute for the recording of liens against real property. Although the Appellate Division affirmed the judgment, it disagreed with Special Term's rationale. It was the Appellate Division's view that no debt was due from Bottone to Fleetwood to which the government's lien could attach: the fund deposited by Bottone was a substitute for her real property and, since the United States had no lien against such property, it had no lien "upon the funds deposited in substitution therefor."

We cannot agree. On the basis of the controlling federal statute (Internal Revenue Code of 1939, U. S. Code, tit. 26, §§ 3670, 3672), as well as the federal decisions construing

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it, the government tax lien attached to the debt owing to Fleetwood and that lien is entitled to priority.

The Internal Revenue Code of 1939 provided, as does the present code, a lien of exceedingly broad scope in favor of the United States for unpaid taxes. The amount of the tax was to be "a lien * * * upon all property and rights to property" belonging to the taxpayer and the lien "shall arise at the time the assessment list was received by the collector [fol. 100] and shall continue until the liability for such amount is satisfied" (§§ 3670-3671). However, the statute went on to declare, "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector [in] the office * * * authorized by the law of the State * * * in which the property subject to the lien is situated" (§ 3672, subd. [a], par. [1]). By this state's law, the place provided for filing differs depending on whether the lien is asserted against real or personal property. In the case of a lien upon real property, the notice is to be filed in "the office of the clerk of the county in which real property subject to such lien is situated" (Lien Law, § 240, subd. 1), in the case of a lien upon personal property, "in the town or city where the owner * * * resides at the time the lien arises" (§ 240, subd. 2).

The "relative priority of the lien of the United States for unpaid taxes is," the Supreme Court has said, "always a federal question to be determined finally by the federal courts." (United States v. Acri, 348 U. S. 211, 213; United States v. Security Tr. & Sav. Bk., 340 U. S. 47, 49; Illinois v. Campbell, 329 U. S. 362, 371; United States v. Waddill Co., 323 U. S. 353, 356-357.) Turning, therefore, to the federal decisions, we find the rule firmly established that, once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it. (See United States v. Colotta, 350 U. S. 808, revg. 224 Miss. 33; United States v. Acri, supra, 348 U. S. 211, 214; United States v. Liverpool & London Ins. Co., 348 U. S. 215, 217; United States v. Scovil, 348 U. S. 218, 220; United States v. New Britain, 347 U. S. 81, 84-87; United States v. Gilbert Associates, 345 U. S. 361, 365; United States v. Security Tr. &

Sav. Bk., supra, 340 U. S. 47, 50-51; United States v. Kings County Iron Works, 224 F. 2d 232, 234-235, 237.)

[fol. 101] In the case before us, the government concededly filed notice of its lien, in the office of the clerk of the city where the taxpayer resided, before the plaintiffs filed their notices and, since such notice of lien is indisputably effective against all personal property and rights thereto belonging to the taxpayer (Lien Law, § 240, subd. 2), decision herein depends solely on whether the indebtedness due to Fleetwood from Bottone constituted property of Fleetwood.

The lien filed by the government in October, 1952, before any mechanic's lien had been recorded, was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer. It was asserted against the contractual obligation of Bottone to Fleetwood, against Bottone's indebtedness to the latter, and, quite obviously, within the statutory terms, personal "property and rights to [such] property" belonging to the taxpayer (U. S. Code, tit. 26, § 3670; see United States v. Kings County Iron Works, supra, 224 F. 2d 232, 234-235, 237; cf. Fidelity & Deposit Co. v. New York City Housing Auth., 241 F. 2d 142, 144-145). Since the government did all that the applicable law demanded when it recorded its notice in the city clerk's office (Lien Law, § 240, subd. 2), its tax lien is superior to any other lien subsequently filed.

It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (See United States v. Vorreiter, 355 U. S. 15, revg. 134 Col. 543; United States v. White Bear Brewing Co., 350 U. S. 1010, revg. 227 F. 2d 359; United States v. Colotta, supra, 350 U. S. 808, revg. 224 Miss. 33; United States v. Scovil, supra, 348 U. S. 218, 220-221; United States v. New Britain, supra, 347 U. S. 81, 84-87; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.) That being [fol. 102] so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors (§ 36-a; § 13, subd. [7])—may not be con-

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strued to affect the rights of the government or the priority of its tax lien.[1]

The Kings County Iron Works case (supra, 224 F. 2d 232), also involving the question of priority between the government's tax lien and a mechanic's lien in New York, is virtually indistinguishable from the present case. There, as here, a contractor, entitled to be paid by the owner of the real property which had been improved, owed money both to the United States for unpaid taxes and to his subcontractor for work performed. There, just as here, the subcontractor filed notice of its mechanic's lien against the property about a week after the government had filed notice of its tax lien at the place where the taxpayer-contractor maintained its place of business. There, too, the property owner paid the amount in question into court for judicial determination of priority between the government and the mechanic's lienor. The district court awarded the latter priority on much the same grounds as did the trial court herein (122 F. Supp. 219, sub nom. United States v. Pre-
[fol. 103] ferred Contrs.), but, on appeal, the Court of Appeals for the Second Circuit reversed. It held that the debt owing to the taxpayer was subject to federal levy and was subordinate to the federal tax lien for either of two reasons; on the one hand, because the government filed notice of its lien first and, on the other, because mechanic's lienors, not being within the class of persons protected by subdivision (a) of section 3672 of the Internal Revenue Code, are in no event entitled to challenge a federal tax lien.

Likewise, in the case before us, the government tax lien must be accorded priority for it too was recorded before either Home Maintenance or Colonial Sand filed notices of their respective liens and before Colonial Sand obtained its judgment. Moreover, since Home Maintenance never did become a judgment creditor, recent Supreme Court de-

[1] To the extent that Cranford Co. v. Leopold & Co. (189 Misc. 388, 391-392, affd. 273 App. Div. 754, affd. 298 N. Y. 676) suggests the contrary, it must give way to more recent federal decisions. (See United States v. Scovil, supra, 348 U. S. 218, 221; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 235 et seq.; and other cases cited above.)

cisions impel us to add that its lien would have been subordinate to the federal tax lien even if it had been earlier recorded. (See United States v. Vorreiter, supra, 355 U. S. 15; United States v. White Bear Brewing Co., supra, 350 U. S. 1010, revg. 227 F. 2d 359; see, also, United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.)

The judgment of the Appellate Division should be reversed, and the motion of the United States for summary judgment in each action should be granted.

Chief Judge Conway and Judges Desmond, Dye, Froessel and Burke concur with Judge Fuld; Judge Van Voorhis dissents and votes to affirm.

Judgment reversed and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

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[fol. 104]

IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—December 5, 1957

[fol. 105]

No. 106

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Action No. 1

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(and another action)

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Be it Remembered, That on the 3rd day of April in the ear of our Lord one thousand nine hundred and fifty-seven, nited States of America, the defendant-appellant in both ctions, came here unto the Court of Appeals, by Paul W. illiams, its attorney-, and filed in the said Court a Notice Appeal and return thereto from the judgment of the ppellate Division of the Supreme Court in and for the econd Judicial Department. And Robert Aquilino & ano., -partners doing business under the firm name and style Home Maintenance Co., the plaintiffs-respondents in ction No. 1, and Colonial Sand and Stone Co., Inc., the fendant-respondent in Action No. 1 and the plaintiff-spondent in Action No. 2, and Home Maintenance Com-ny, the defendant-respondent in Action No. 2, afterwards peared in said Court of Appeals by Charles S. Friedman d Jacob I. Goodstein, their attorneys.

Which said Notice of Appeal and the return thereto, filed aforesaid, are hereunto annexed.

ol. 106] Whereupon, The said Court of Appeals having ard these causes argued by Mr. Daniel F. McMahon, of unsel for the appellant-, and by Mr. Harold M. Edwards, counsel for the respondents Aquilino and Spero, and omitted by the respondent Colonial Sand & Stone Co., ., and after due deliberation had thereon, did order and judge that the judgment of the Appellate Division of the preme Court appealed from herein be and the same reby is reversed and the matter remitted to Special Term further proceedings in accordance with the opinion ein.

And it was also further ordered, that the records afore-d, and the proceedings in this Court, be remitted to the d Supreme Court, there to be proceeded upon according aw.

l. 107] Therefore, it is considered that the said judg-nt be reversed &c., as aforesaid.

nd hereupon, as well the Notice of Appeal and return reto aforesaid as the judgment of the Court of Appeals resaid, by it given in the premises, are by the said rt of Appeals remitted into the Supreme Court of the te of New York before the Justices thereof, accord-to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

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[fol. 108]

IN COURT OF APPEALS OF NEW YORK

Present, Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 195

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Action No. 1

ROBERT AQUILINO & ano., co-partners doing business under the firm name and style of Home Maintenance Co., Plaintiffs-Respondents,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant,

and

FLEETWOOD PAVING CORPORATION, Defendant,

and

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

(and another action)

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ORDER DENYING MOTION FOR REARGUMENT AND GRANTING MOTION TO AMEND REMITTITUR—April 15, 1958

A motion for reargument or, in the alternative, to amend the remittitur in the above causes having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

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Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks amend the remittitur, be and the same hereby is granted. eturn of the remittitur requested and, when returned, it ll be amended by adding thereto the following:

"Upon the appeal herein, as the opinion of the Court indicates, there was presented and necessarily passed upon a question under the Constitution of the United States, namely, the construction of provisions of the Internal Revenue Code (U.S. Code, tit. 26, §§3670-3672). Plaintiffs argued that such provisions were not decisive or controlling. This Court held to the contrary."

ol. 109] And the Supreme Court, Westchester County, hereby requested to direct its Clerk to return said rettitur to this Court for amendment accordingly.

A copy

Gearon Kimball, Deputy Clerk.

---

l. 112]

COURT OF APPEALS
OF THE STATE OF NEW YORK

---

Action No. 1

BERT AQUILINO and JOSEPH SPERO, copartners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

FLEETWOOD PAVING CORPORATION, Defendant,

*and*

ONIAL SAND AND STONE CO., INC., Defendant-Respondent.

---

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

*and*

HOME MAINTENANCE COMPANY, Defendant-Respondent.

---

NOTICE OF MOTION

Sirs:

Please take notice, that upon the brief submitted herewith, the undersigned, will move this Court at a stated term [fol. 113] thereof pursuant to Rule XX of the Rules of the Court of Appeals to be held at the Court Room of this Court, Court of Appeals Hall, Eagle Street, Albany, New York on Monday, March 31, 1958, at the opening of the Court on that day for an order granting reargument of the appeal in the above entitled matter, and in the event that such reargument be denied, for an order amending the remittitur in the above entitled matter certifying the Federal question implicit herein to enable the respondents to petition to the Supreme Court of the United States for a writ of certiorari in the form set forth in the annexed memorandum, and for such other and further relief as to the Court may seem just and proper.

Dated: March 19, 1958.

Yours, etc.,

Charles S. Friedman, Attorney for Respondents, Robert Aquilino and Joseph Spero, Office and P. O. Address, 10 Fiske Place, Mount Vernon, New York.

Jacob I. Goodstein, Attorney for Respondent, Colonial Sand and Stone Co., Inc., Office and P. O. Address, 21 East 40th Street, New York, New York.

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To: Paul W. Williams, Esq., Attorney for Appellant, United States of America, Office and P. O. Address, United States Court House, Foley Square, New York, New York.

[fol. 114]

COURT OF APPEALS
OF THE STATE OF NEW YORK

Action No. 1

ROBERT AQUILINO and JOSEPH SPERO, copartners doing business under the firm name and style of HOME MAINTENANCE CO., Plaintiffs-Respondents,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

FLEETWOOD PAVING CORPORATION, Defendant,

*and*

COLONIAL SAND AND STONE CO., INC., Defendant-Respondent.

Action No. 2

COLONIAL SAND AND STONE CO., INC., Plaintiff-Respondent,

*against*

UNITED STATES OF AMERICA, Defendant-Appellant,

*and*

MARIO'S MIRAMARE RESTAURANT, FLEETWOOD PAVING CORPORATION, Defendants,

*and*

HOME MAINTENANCE COMPANY, Defendant-Respondent.

BRIEF IN SUPPORT OF MOTION FOR REARGUMENT AND IN THE ALTERNATIVE FOR AN ORDER AMENDING THE REMITTITUR

The above entitled appeal was decided by this Court on December 5, 1957 and the opinion of the Court by Judge

[fol. 115] Fuld is reported in 3 N. Y. 2d 511. The order of this Court has not as yet been carried out at Special Term due to the present motion for reargument and for leave to amend the remittitur.

Reargument

Respondents seek reargument upon the ground that the defendant Fleetwood Paving Corporation had, at no time, a right to property within the statutory meaning of United States Code, Title 26, Sec. 3670. The Court has stated the issue in this case in its opinion as follows:

> "Decision herein depends solely on whether the indebtedness due to Fleetwood from Bottone constituted property of Fleetwood".

The Court then assumes that the lien of the government was asserted "against the contractual obligation of Bottone to Fleetwood against Bottone's indebtedness to the latter, and, quite obviously within the statutory terms, personal 'property and rights to (such) property' belonging to the taxpayer".

The Court, by citing Federal cases which purport only to classify for Federal purposes fundamental interests created by the law of the State of New York, assumes without further comment that such an interest exists under local law which a court may classify as "property and rights to (such) property" within the terms of Title 26, Sec. 3670, United States Code. In making this assumption, respondents feel that the court overlooked their fundamental argument that no such interests exist under New York Law (respondent Aquilino's brief, pp. 9-16).

[fol. 116] As a supplemental argument to clarify respondents' point it is believed that the court misconstrued the holding of the Second Circuit in *United States* v. *Kings County Iron Works*, 224 F. 2d 232. That decision was based upon a determination that New York Law created interests in the taxpayer which, under Federal scrutiny when applying a Federal statute, constituted "property or right to (such) property". Judge Medina in *Fidelity and Deposit Co. of Maryland* v. *New York City Housing Authority*, 241

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F. 2d 142, at pages 144-145 said "the court did not inquire whether the state had created a right. It assumed that it did, and was concerned with the 'relative priority of a Federal tax lien and a mechanic's lien under state law'. *United States* v. *Kings County Iron Works, supra,* at page 234." It is the function of this Court, and its sole prerogative, to determine that which the Court in *United States* v. *Kings County Iron Works,* assumed; namely, whether under State law a right has been created. In the language of Judge Dimock in his opinion following Judge Medina's ruling (*Fidelity and Deposit Co. of Maryland* v. *New York City Housing Authority* on remand from the Circuit Court of Appeals, 157 F. Supp. 87) "The nature of the interest of the contractor, as distinguished from the priority of the government, was to be determined by the law of the State of New York".

Since respondents believe that the scope and effect of relevant Federal decisions are best determined by reference to succeeding Federal decisions, especially those of the same court which rendered the original decision, the view expressed in the *Fidelity and Deposit Company of Mary-*
[fol. 117] *land* case should govern, at least to the extent of inquiring first whether an interest in the property exists in favor of the taxpayer under the New York law.

The respondents contend that no interest in the property involved existed under the law of the State of New York in favor of the defendant Fleetwood Paving Corporation, and that therefore there is no "property or right to (such) property" to which a Federal tax lien can attach under United States Code, Title 26, Sec. 3670.

Under Section 3 of the New York State Lien Law the subcontractor is given a lien upon the real property improved with the consent or at the request of the owner or his agent or contractor, effective from the time of filing. Section 4 sets forth the extent of the lien. The above sections make it clear that from the time of filing the subcontractor possessing a mechanic's lien has the sole right to payment under the contract to the extent that the agreed price or value has not yet been paid. See also Section 56, New York Lien Law.

To the extent that the contractor has been paid under the contract, he holds such payment in trust for the benefit

of subcontractors. If he uses the proceeds for any other purpose, he commits larceny (Lien Law, Sec. 36a). It is anomalous to maintain that the contractor has a beneficial interest in property which he cannot use for his own benefit without committing larceny. The New York State Joint Legislative Committee, when recommending enactment of Section 36a, indicated their view as follows:

> [fol. 118] "These amendments are recommended for the reason that * * * the present section * * * does not offer any protection to laborers and materialmen * * * who have not filed liens prior to such diversion" (Legislative Document No. 72, 1930, Vol. 19).

Since a contractor who "diverts" from its true owners funds in his possession belonging to them is guilty of a crime, it follows that the contractor, owing to a subcontractor acts only as a conduit for the purpose of conveying the property to the beneficial owner.

The reasoning above set forth is implicit in decisions under the Bankruptcy Act (United States Code, Title 11, Sec. 107). Under that Act the mechanic's lienor under New York law is entitled to have his property set aside from the other assets of the bankrupt even though his lien is not filed (*Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415). Judge Augustus Hand in that case indicated that even though the lien is not filed the laborer or materialman is the beneficial owner of a valid trust established under Section 36a of the New York Lien Law (see also *Wade* v. *Nassau Lumber and Supply Co.*, 275 App. Div. 864).

In its opinion this Court stated that in so far as *Cranford Co.* v. *Leopold Co.*, 189 Misc. 388, aff'd 273 App. Div. 754, aff'd 298 N. Y. 676, was inconsistent with relevant Federal decisions, it must yield. The Court is saying that, although under New York law the mechanic's lienor is a statutory assignee of the fund created by Section 36a, New York Lien Law, he is not made thereby a purchaser within the terms of the Federal tax act. Nevertheless the mechanic's [fol. 119] lienor is still a statutory assignee of the fund and as such has sole interest in the property. His interest arose

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when he performed the work, and his toil was the very thing which gave rise to an obligation on the part of the owner of the property to pay. The workman or materialman is a statutory assignee of the property at its inception since the fund includes not only payment but also "the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him" (see last sentence Sec. 36a, Lien Law). It follows that the lienor had the sole beneficial right to payment under the contract at all times when the contract is read in conjunction with New York State law as it existed at the time of its execution.

Respondents therefore submit that Fleetwood Paving Corporation had no beneficial interest in the property concerned, and, therefore, no "property or right to (such) property" within the meaning of the pertinent provisions of the United States Code.

Should this Court deny the motion for reargument, respondents move that the remittitur be amended to certify the Federal question implicit herein to enable respondents to petition the Supreme Court of the United States for a writ of certiorari.

Respondents propose that the Federal question be certified as follows:

That, although under the law of the State of New York respondents have sole interest in the property in question, Federal decision as exemplified by *Kings County Iron Works* v. *New York City Housing Authority*, 224 F. 2d 232 [fol. 120] (Second Circuit, 1955), compel this Court to find that the taxpayer has "property or right to (such) property" within the meaning of United States Code, Title 26, Section 3670, and, therefore, that the Government has a valid tax lien on the property in question.

Respectfully submitted,

Charles S. Friedman, Attorney for Respondents, Aquilino and Spero.

Jacob I. Goodstein, Attorney for Respondent, Colonial Sand and Stone Co., Inc.

Harold M. Edwards, Kenneth Jay Breskin, of Counsel.

[fol. 121]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

JUDGMENT FILED IN SUPREME COURT, WESTCHESTER COUNTY, NEW YORK ON REMITTITUR OF COURT OF APPEALS—
May 22, 1958

Present: George M. Fanelli, Justice.

The defendant, United States of America, having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of the County of Westchester, on the 27th day of August, 1957, affirming the prior order and judgment of this Court heretofore entered herein in the office of the Clerk of the County of [fol. 122] Westchester on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying the cross-motion of defendant, the United States of America for summary judgment; striking out the answers of said defendant, and adjudging that plaintiffs in Action No. 1 have a valid lien for the sum of $1,400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund for the sum of $896.25, and from each and every part of said order and judgment of affirmance as well as from the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that said judgment so appealed from as aforesaid be reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein; and the remittitur from said Court of Appeals having been [fol. 123] filed herein and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for defendant, United States of America, it is hereby

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Ordered and Adjudged, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and Adjudged, that the said order and judgment entered herein on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, be and the same hereby is reversed and the cross-motion of defendant, United States of America, for summary judgment in each action be and the same is hereby granted; and it is further

[fol. 124] Ordered and Adjudged, that defendant, Fleetwood Paving Corp., is indebted to defendant, United States of America, in the sum of $3,523.41; and it is further

Ordered and Adjudged that, the claim of the defendant, United States of America, is prior to and superior to the claims of plaintiffs and of the other defendants in both actions herein; and it is further

Ordered that, the Commissioner of Finance, Westchester County, pay to the defendant, United States of America, the Two Thousand Two Hundred and no/100 Dollars ($2,200.), plus accrued interest, if any, and less fees allowed by law, which is on deposit with him to the credit of this action, as shown in the certificate of the Commissioner of Finance, Westchester County, attached hereto, in partial satisfaction of the taxes due from Fleetwood Paving Corp. to the United States of America, upon pres-
[fol. 125] entation of two certified copies of this order.

Enter:

George M. Fanelli, J. S. C.

Edward L. Warren, Clerk.

[fol. 126]

SUPREME COURT OF THE UNITED STATES

No. 132, October Term, 1958

ORDER ALLOWING CERTIORARI—Filed February 24, 1959

The petition herein for a writ of certiorari to the Cou
of Appeals of the State of New York is granted; and t
case is transferred to the summary calendar.

And it is further ordered that the duly certified copy
the transcript of the proceedings below which accompani
the petition shall be treated as though filed in response
such writ.

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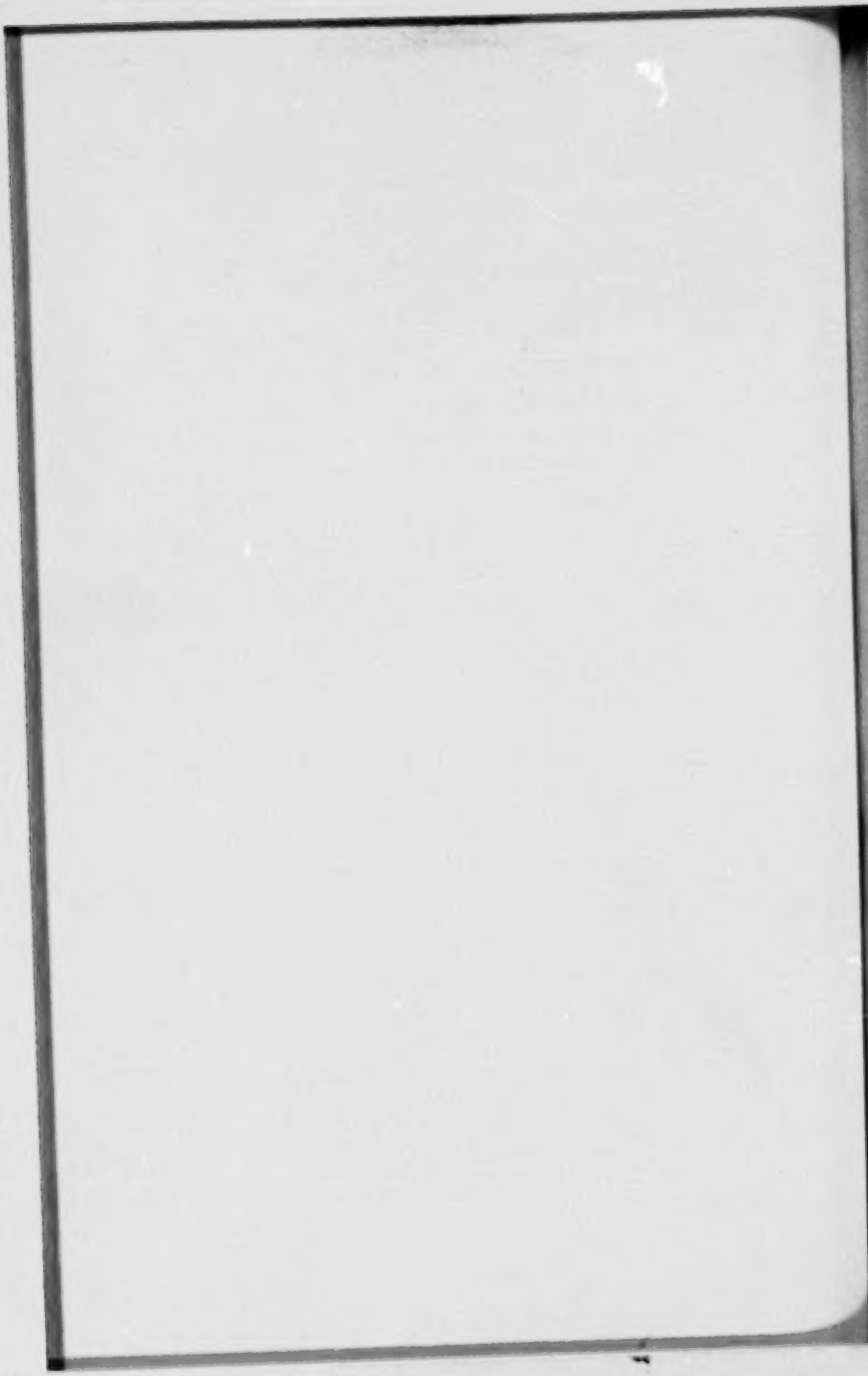

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JOHN T. FEY, C[redacted]

IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

---

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

---


CHARLES S. FRIEDMAN,
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JACOB I. GOODSTEIN,
Attorney for Petitioner,
Colonial Sand & Stone Co., Inc.,
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HAROLD M. EDWARDS,
KENNETH J. BRESKIN,
Of Counsel.

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## INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 3 |
| Statement | 3 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 17 |
| Appendix: | |
| (a) Opinion of New York State Court of Appeals | 18 |
| (b) Judgment and Remittitur of New York State Court of Appeals | 24 |
| (c) Order of New York State Court of Appeals on Motion for Reargument and Amendment of Remittitur | 28 |
| (d) Judgment of New York State Supreme Court, Westchester County, Entered on Remittitur of the Court of Appeals | 30 |
| (e) The Federal Lien for Taxes | 33 |
| (f) The New York State Lien Law | 34 |


### CITATIONS


| | |
|---|---|
| *Cases:* | |
| *Albert Pick Co., Inc.* v. *Travis*, 6 F. Supp. 486 | 13 |
| *Barter* v. *Hawksworth*, 102 Misc. 242, 169 N.Y.S. 475 | 12 |

PAGE

*Corbin-Kellogg Agency, Inc.* v. *Tasker*, 248 App. Div. 58, 289 N.Y.S. 156 ..... 11

*Cranford Co.* v. *L. Leopold and Co.*, 298 N. Y. 676, 82 N. E. 2d 580, affirming 273 App. Div. 754, 75 N.Y.S. 512, affirming 189 Misc. 388, 70 N.Y.S. 183 ..... 12

*Einach's Estate, In re*, 1 Misc. 2d 537, 146 N.Y.S. 2d 240 ..... 12

*Ellis' Estate, Matter of*, 110 Misc. 192, 179 N.Y.S. 873 ..... 12

*Fidelity and Deposit Company of Maryland* v. *New York Housing Authority*, 241 F. 2d 142 .....7, 8, 14, 15, 16, 17

*Franklin, Matter of*, 26 Misc. 107, 56 N.Y.S. 858 12

*Heintzelman Construction Co., In re.*, 34 F. Supp. 109 ..... 11

*Morgan* v. *Commissioner*, 309 U. S. 78 ..... 8

*Powers' Estate, Matter of*, 75 Misc. 85, 134 N.Y.S. 967 ..... 12

*Ridgefield Supply Co.* v. *Rosen*, 1 Misc. 2d 675, 147 N.Y.S. 2d 337 .....11, 12

*Rosicato* v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353 ..... 11

*Stiles' Estate, In re*, 126 Misc. 715, 215 N.Y.S. 134 12

*Treister & Son, Inc., In re*, 145 F. Supp. 144 .. 11

*United States* v. *Acri*, 348 U. S. 211 ..... 14

*United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958 .....8, 10, 13, 14, 15

*United States* v. *City of New Britain*, 347 U. S. 81 .....14, 15

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PAGE

*United States* v. *Colotta*, 350 U. S. 808 ..... 14

*United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232 ..... 14, 16

*United States* v. *Liverpool & London & Globe Insurance Co., Ltd.*, 348 U. S. 215 ..... 14

*United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 ..... 8, 15

*United States* v. *Scovil*, 348 U. S. 218 ..... 14

*United States* v. *Security Trust and Savings Bank*, 340 U. S. 47 ..... 14.

*United States* v. *Vorreiter* 355 U. S. 15 ..... 14

*United States* v. *White Bear Brewing Co.*, 350 U. S. 1010 ..... 14

*United States Fidelity and Guaranty Co.* v. *Triborough Bridge Authority*, 297 N. Y. 31, 74 N. E. 2d 226 ..... 16

*Wade* v. *Nassau Suffolk Lumber and Supply Corp.*, 275 App. Div. 864, 89 N.Y.S. 2d 294 12

*Waldman* v. *D. & V. Plumbing & Heating Contractors, Inc.*, 102 N.Y.S. 2d 787 ..... 12

*Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842) certiorari denied, 314 U. S. 686 ..... 13

atutes:

Bankruptcy Act:

Section 64 a (5), 11 U.S.C. 104 a (5) ..... 13

Section 70 a, 11 U.S.C. 110 a ..... 13

PAGE

Internal Revenue Code of 1939:

Section 3670. 11 U.S.C. (1952 ed.) 3670 ....3, 7, 7

Section 3671, 26 U.S.C. (1952 ed.) 3671 .... 3, 8

Section 3672, 26 U.S.C. (1952 ed. ) 3672 .... 15

Internal Revenue Code of 1954:

Section 6321, 11 U.S.C. (1952 ed., Supp. II) 6321 ..... 3

Section 6322, 11 U.S.C. (1952 ed., Supp. II) 6322 ..... 3

New York Lien Law:

Section 3 ..... 10

Section 36a .....3, 4, 9, 11, 12

31 U.S.C. 191 (R. S. 3466) ..... 12

Miscellaneous:

"Act, Recommendation and Study relating to the Fund Provisions of the Lien Law," 1942 Report, New York State Revision Commission .....10, 11

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

---

No. .....

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners Robert Aquilino and Joseph Spero, doing
siness as Home Maintenance Co. and Petitioner Colonial
nd and Stone Co., Inc. pray that a writ of certiorari
ue to review the judgment of the New York Court
Appeals entered in the above-captioned cases on Decem-
r 5, 1957, as amended on April 3, 1958.

## Opinions Below

The opinion of the New York Court of Appeals (Pe
App. (a) p. 18) is reported at 3 N. Y. 2d 511, 146 N. E.
774. The opinion of the Appellate Division, Second D
partment (R. 91-94) is reported at 2 A. D. 2d 747, 1
N.Y.S. 2d 268. The opinion of the Supreme Court, We
chester County (R. 76-78) is reported at 140 N.Y.S. 2d 3

## Jurisdiction

The judgment of the New York Court of Appeals w
entered on December 5, 1957 (Pet. App. (b) p. 24). A m
tion for rehearing was denied and the remittitur amend
on April 3, 1958 (Pet. App. (c) p. 28). The jurisdicti
of this Court is invoked under 28 U.S.C. 1257 (3).

## Question Presented

Section 3670 of the Internal Revenue Code of 1939 i
poses a tax lien on all "property and rights to property
of a defaulting taxpayer. Under New York law, all mone
accruing to the credit of a general contractor or paid ov
to him, arising from the improvement of real propert
constitute trust funds for the benefit of subcontractor
laborers and materialmen, to the extent of their unpa
claims for the work, labor, services and material, the fu
nishing and rendition of which created the credit-fund
moneys paid over.

The question presented is whether the general contra
tor's interest, solely as trustee, in the res of this stat
torily-created trust constitutes "property" or "rights t
property" under the federal tax lien law.

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## Statutes Involved

The pertinent provisions of the federal tax lien law and the New York law are set forth in an appendix, *infra*, pages 33 and 34.

## Statement

Petitioners are subcontractors, laborers and materialmen who are statutory beneficiaries of a trust under New York Lien Law, Section 36-a, *infra*, page 34. They instituted two separate suits in the New York Supreme Court, Westchester County, to reach their beneficial interest under this trust. By stipulation of counsel, the two cases were heard and tried together both in the trial court and in the subsequent appeals (R. 48).

The undisputed facts may be summarized as follows: On December 27, 1951, the Collector of Internal Revenue, Albany District, received an assessment for unpaid withholding taxes against Fleetwood Paving Corporation in the amount of $4,464.70 (R. 70). On March 21, 1952 the Collector received an additional tax assessment against Fleetwood, this time in the amount of $3,168.00 (R. 71). Under the provisions of 26 U.S.C. (1952 ed.) and 3670 and 3671[1], *infra*, page 33, the United States obtained a statutory lien on all the taxpayer's "property and rights to property" by virtue of the Collector's receipt of these assessments.

Subsequently, the taxpayer contracted with Mrs. Ada Bottone to make certain improvements on her newly-acquired restaurant which she styled Mario's Miramare Restaurant (R. 67).[2]

---

[1] These provisions are incorporated in the Internal Revenue Code of 1954 as 26 U.S.C. (1952 ed., Supp. II) 6321 and 6322.

[2] The exact date of this contract does not appear in the record. However, it necessarily occurred subsequent to July 8, 1952, the date on which Ada Bottone acquired title to the restaurant (R. 66). In any event, the exact date of this contract is immaterial.

On August 25, 1952, the taxpayer entered into a subcontract with petitioners Aquilino and Spero, doing business as Home Improvement Company (R. 26), under which these petitioners agreed to rebuild the front porch and reservice the walls, floor and steps of the side porch of Mrs. Bottone's restaurant (R. 29-30). Petitioners Aquilino and Spero performed the subcontract, but remain unpaid in the amount of $1400.00 (R. 26). Under New York Lien Law, Section 36-a, petitioners Aquilino and Spero are beneficiaries of a trust consisting of the funds and moneys which become due from and payable by Mrs. Bottone by virtue of the work, labor and material furnished and performed by petitioners, and they subsequently instituted this suit to reach their beneficial interest (R. 23-29).

Sometime between October 2 and October 8, 1952, Petitioner Colonial Sand and Stone Co., Inc. sold to the taxpayer, Fleetwood, some stone and cinders for use in the construction which the taxpayer had undertaken in connection with its contract with Mrs. Bottone (R. 62). The agreed purchase price for this material was $896.25 (R. 62). The taxpayer failed to pay Colonial (R. 62) and it too filed suit to reach such earned funds which comprised a trust fund for their benefit under the New York Lien Law, Section 36-a (R. 33-42).

In her answer in each of the actions, Mrs. Bottone admitted that she owed $2,200.00 for the improvements made by petitioners as subcontractors and materialmen of the defaulted taxpayer, but stated that the United States had served notice of its assertion of a tax lien against such fund (R. 31-32, 44). She then filed a motion requesting that both actions be dismissed as to her upon her deposit of the $2200.00 with the Clerk of the County, and that the United States be substituted as a party defendant in view of its assertion of a right to the fund superior to petitioners' (R. 49-50). The motion was granted, and the court ordered deposit of the $2200.00 with the Clerk of the County, the

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itution of the United States as party defendant, and ce of the order on the United States (R. 50). The rnment subsequently filed answers in each suit assert- nat its tax lien gave it rights in the fund superior to oners' (R. 51-58). By stipulation of the parties, both were heard and tried together (R. 48).

itioners Aquilino and Spero, Petitioner Colonial Sand Stone Co., Inc. and the Government each moved for ary judgment (R. 13-15, 59-61, 68-69). The trial ruled that petitioners' beneficial interest in the trust which consisted of the money deposited with the prevailed against the Government's tax lien and d pro rata distribution of the money between Peti- s Aquilino and Spero and Petitioner Colonial Sand tone Co., Inc. (R. 76-78). The Government appealed Appellate Division of the Supreme Court which d (R. 91-94). A unanimous court ruled that "there present, no debt due and owing from Bottone to axpayer] to which [the Government's] lien may " (R. 93). The Government thereupon appealed to w York Court of Appeals, which reversed, ruling e trust funds, constituting Mrs. Bottone's indebted- r the improvements made to her restaurant by the ners was "quite obviously within the statutory terms rty and rights to [such] property' belonging to the er." (Pet. App. (a) p. 21, 3 N. Y. 2d at 516, N. E. While indicating in a footnote that one of its own s suggests a contrary conclusion, the court felt to follow what it considered to be indications in the e direction in more recent federal opinions (Pet. a) p. 22, 3 N. Y. 2d at 516, 146 N. E. 2d at 778).[3] orhis, J. dissented. Petitioners' motion for rehear- denied (Pet. App. (c) p. 28), and this petition for ri followed.

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[3] *infra*, p. 22.

## Reasons For Granting the Writ

The New York Court of Appeals has ruled that, despite the fact that petitioners are beneficiaries of the statutorily-created trust funds in question, such funds are the property of the trustee and not of the beneficiaries for purposes of the Federal tax lien law.

In effect the court has ruled that New York law does not and can not give any protection to a subcontractor, materialman or laborer against an outstanding federal tax lien on the contractor irrespective of when the tax lien arose or was filed. In this state of the law, the attachment of the federal tax lien may well be tantamount to a judgment of financial ruin for a general contractor, subcontractor, materialman or laborer for no well-advised subcontractor, materialman or laborer will deal with a general contractor, knowing that any funds which accrue as a result of the work, labor and materials furnished and performed will be subject first to payment of the Government's tax lien. Essentially, the reluctance of a subcontractor, materialman or laborer to enter into contractual relations with a general contractor whose earned funds may become subject to an unknown outstanding federal tax lien, is the materialman or laborer's justifiable fear that the Government will take the corpus of the state-created trust to pay the general contractor's taxes. The result is that the general contractor-taxpayer is hindered from earning the very profit which would enable him to pay his tax lien. Accordingly, the decision below not only tends to strangle the contractor financially, but produces no concomitant gain to the Government.*

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* This is no far-fetched prophecy of doom, but a practical effect of the decision below. This result in practice will be reached in this way: A contractor who, we may assume from the existence of the federal tax lien, is in a somewhat shaky financial condition, will attempt to extricate himself by the undertaking of several new projects. He is awarded a contract and seeks to perform it by

(*Footnote continued on following page*)

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is submitted that this result finds no support in reason
the language of the federal tax lien statute, 26 U.S.C.
2 ed.) 3670, which provides the Government with a lien
on the taxpayer's property. Moreover, the decision
conflict with the theory of the controlling authority in
Court of Appeals for the Second Circuit, *Fidelity and*
*sit Company of Maryland* v. *New York Housing Au-*
*ty*, 241 F. 2d 142. It is also in direct conflict with at
four cases holding that the contractor's interest in
trusts is not "property" for purposes of the Bank-
y Act and is therefore not part of the bankrupt's
e.

th the increase in business failures as a result of the
nt recession, cases controlled by the instant case will
the courts with growing frequency. It is likely that,
this Court passes on this question now, it will be
to do so again and again in the next few years. In
circumstances, petitioners submit that review by this
is merited.

*The Statutory Trust.* The Internal Revenue Code, 26
(1952 ed.) 3670, *infra*, p. 33, imposes a lien on all
erty and rights to property" of a defaulting tax-
this lien attaches from the time the tax assessment

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*ote continued from preceding page*)

racting with various materialmen and laborers. These ma-
n and laborers, however, will often not subcontract with the
or unless he provides a payment bond. A surety will nor-
ndertake to issue such a bond on a profitable contract on
s of the extensive protection afforded the materialmen and
under the New York law as beneficiaries of a trust of the
s under the contract. The surety is subrogated to these
the event it is called upon to satisfy the bond. However,
fter examining the assessment list at the district office of
rnal Revenue Service, the surety discovers the existence of
ral tax lien, it will refuse to issue the payment bond or
an excessive price for it because, under the decision below,
vent it is called upon to satisfy the bond, the federal gov-
will have rights prior to those of the materialmen and

list is received by the Collector of Internal Revenue, 26 U.S.C. (1952 ed.) 3671. The question in this case turns on whether this defaulting taxpayer had any interest in the moneys which were deposited with the Clerk of the County which can legitimately be characterized as "property" or "rights to property" under the federal tax statute.

It is well settled that the determination as to what is "property" or "rights to property" under a federal statute is a matter of federal law. However, it is equally well settled that the nature and extent of the taxpayer's rights and interest in the moneys is a matter of local law.[5] "Since § 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law, * * * we must look first to" the interests in the money "as defined by state law," *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958. Accordingly, we proceed now to consider the nature of the state-created rights in this state-created trust.

The fund in question arose by reason of the improvements made to Mrs. Bottone's restaurant by the petitioners herein. Until these improvements were made, there was no fund available to either the defaulting taxpayer or the the petitioners.[6] Immediately upon performance of the improvement by the petitioners, the fund came into existence—but did not belong to the defaulting taxpayer. Under New York law, even if the owner paid over the earned funds to the defaulting taxpayer (general contractor) its custody thereof was merely as trustee for the benefit of the subcontractors, laborers and material-

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[5] *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958; *Morgan* v. *Commissioner*, 309 U. S. 78; *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587, 593 (dissenting opinion); *Fidelity and Deposit Corporation of Maryland* v. *New York Housing Authority*, 241 F. 2d 142 (C. A. 2).

[6] Certainly the execution of a contract between the taxpayer and Mrs. Bottone, without more, gave rise to no interest in the taxpayer to which the tax lien could attach.

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n whose work, labor and material created the fund, the extent of their unpaid claims. Of course, the state's aracterization of this fund as a trust fund is not con-sive for purposes of federal law. However, when we mine the rights and interests created by the state in h fund, we find that its characterization as a trust d is not merely a label, but that, contrarily, such trust reated by the state, both in law, fact and in every ailed respect just as any other money held under a t. In so far as it is possible for a legislature to make contractors, materialmen and laborers, such as peti-ers, the beneficial owners of the funds in question, the e has done so. This is at once apparent in the statute f, in its legislative history and in the treatment by courts of these funds, or the debt therefor, in varying ations.

ne statute itself provides that "The funds received contractor from an owner for the improvement of property are hereby declared to constitute trust funds e hands of such contractor to be applied first to the ment of claims of subcontractors, architects, engineers, eyors, laborers and materialmen arising out of the ovement." New York Lien Law, Section 36-a. More-the debt is also part of the trust: " • • • [T]he trust shall include the right of action upon an obligation moneys due or to become due to a contractor, as well oneys actually received by him.'" (Ibid.) Diversion

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his sentence is introduced by the phrase, "For the purpose vil action only." The legislative history of the phrase clearly strates, however, that by it the legislature intended simply to riminal sanctions to cases where the contractor diverted funds received, rather than extend it to cases where the contractor d the debt. Under the law prior to an amendment of 1942 t, as opposed to moneys received in payment thereof, was not the trust. In 1942 the legislature amended the law so that st fund included the debt as well as moneys in payment Also prior to 1942, it was not clear whether diversion of

(*Footnote continued on following page*)

of moneys in the trust fund is a felony: "* * * [A]ny contractor * * * who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and is punishable as provided in section thirteen hundred and two of the penal law." (Ibid.) Finally, this trust "may be enforced by a civil action." (Ibid.) As this Court has recently stated: "It would be anomalous to view as 'property' subject to [the federal tax] lien proceeds never within the [taxpayer's] reach to enjoy. *United States* v. *Bess,* Nos. 395 and 410, 1957 Term, decided June 9, 1958.

While the New York law also gives the subcontractors, laborers and materialmen liens on the improved property (New York Lien Law, Section 3), the trust, comprised of the funds earned, the debt for the work done and any moneys in payment thereof, are totally independent of and unaffected by the existence of the lien on the property. The trust may be enforced "by any person entitled to share in the fund,[8] whether or not he shall have filed, or had the right to file, a notice of lien

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(*Footnote continued from preceding page*)
trust funds resulted in civil liability or only in criminal liability. In 1942 the legislature resolved these doubts by specifically providing for civil enforcement. However, in so doing, it did not wish to extend criminal liability beyond what it was prior to the 1942 amendments, when the debt was not part of the trust. Thus, the sentence making the debt part of the trust res is introduced by the words "For the purpose of a civil action only." This history is explained in detail in "Act, Recommendation and Study relating to the Trust Fund Provisions of the Lien Law," 1942 Report, New York State Law Revision Commission 271-336:

"Under present law, the right to receive moneys which, if received would constitute trust funds, is not a trust res. This is a gap in the law. The Commission proposes that the trust res, for the purposes of a civil action only, shall be expanded to enable a beneficiary to reach such choses in action as well as moneys actually in the hands of the trustee. Existing criminal liability is in no way affected. 1942 Report, New York Law Revision Commission, 284.

[8] The procedure for the civil enforcement of the trust is set out in New York Lien Law, Sections 70-76.

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hall have recovered a judgment for a claim arising of the improvement." New York Lien Law, Section The fact that the mechanic's lien and the beneficial est in the trust are independent rights of the ma- lman or laborer is emphasized in a situation where naterialman or laborer may be the beneficiary of the while having no lien at all on the improved prop- This can occur in several ways, for example when mproved property is not located in New York. In a case, the subcontractor, laborer or materialman ave no lien on the "foreign" property by virtue w York law, but is nevertheless the beneficiary of the comprising all funds paid to New York contractor e improvement of the "foreign" property, or the to such funds. *Ridgefield Supply Co.* v. *Rosen,* 1 2d 675, 147 N.Y.S. 2d 337.

se trust provisions, as outlined above, are the result slation first enacted in 1929, and amended on several ns to resolve any lingering doubt that in all respects ds earned and/or the debt due for the improvement property are the beneficial property of the subcon- s materialmen and laborers and not of the general tor. See "Act, Recommendation and Study relat- the Trust Fund Provisions of the Lien Law," 1942 New York State Law Revision Commission, 271- he trustee is to have "all of the obligations of a of an express trust." 1942 Report, New York State vision Commission, 308. This principle has been l meticulously by the New York courts until the in the case at bar, when the court felt that federal pelled otherwise.

*rbin-Kellogg Agency, Inc.* v. *Tasker,* 248 App. Div. N.Y.S. 156, a judgment-creditor attempted unsuc- to reach a debt which was owed to the judgment- or the improvement of real property. In view of tanding claims of materialmen and laborers, the ed, *inter alia,* that "The money due the judgment-

debtor from the owner of the property improved constituted a trust fund belonging to laborers and materialmen. Lien Law, Section 36-a," 248 App. Div. at 61, 289 N.Y.S. at 160. Consequently the judgment-creditor could not reach the debt.

In *In re Einach's Estate,* 1 Misc. 2d 537, 146 N.Y.S. 2d 240, the trustee of one of these statutory trusts died insolvent. The question presented was whether administration expenses of the insolvent estate could be paid from the money realized on the debt which the decedent had held in trust. Under New York law administration expenses, being *charges on* the estate rather than *debts of* the estate, are paid prior to general creditors, lien creditors, and even prior to the priority claims of the state itself.[9] At least one New York court has held that a charge on the estate must be paid prior to a tax claim of the United States, which is given priority to all other claims by 31 U.S.C. 191 (R. S. 3466).[10] Nevertheless, the New York Court in the *Einach* case held that the debt in question belonged beneficially to the materialmen and laborers and hence was not available to satisfy either debts of or charges on the insolvent estate; thus the fund was paid to the materialmen and laborers, rather than to those who held claims for administrative expenses of the insolvent estate. The following cases are other examples of similarly broad readings which the New York courts have given to this statute. *Cranford Co.* v. *L. Leopold and Co.,* 298 N. Y. 676, 82 N. E. 2d 580, affirming 273 App. Div. 754, 75 N.Y.S. 512, affirming 189 Misc. 388, 391-2, 70 N.Y.S. 183, 185-186; *Wade* v. *Nassau Suffolk Lumber and Supply Corp.,* 275 App. Div. 864, 89 N.Y.S. 2d 294; *Ridgefield Supply Co.* v. *Rosen,* 1 Misc. 2d 675, 147 N.Y.S. 2d 337; *Waldman* v. *D. & V. Plumbing &*

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[9] *In re Einach's Estate,* 1 Misc. 2d 537, 146 N.Y.S. 2d 240, 242; *Matter of Franklin,* 26 Misc. 107, 56 N.Y.S. 858; *Matter of Ellis' Estate,* 110 Misc. 192, 179 N.Y.S. 873; *Barter* v. *Hawksworth,* 102 Misc. 242, 169 N.Y.S. 475; *Matter of Powers' Estate,* 75 Misc. 85, 134 N.Y.S. 967.

[10] *In re Stiles' Estate,* 126 Misc. 715, 215 N.Y.S. 134.

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*Heating Contractors, Inc.*, 102 N.Y.S. 2d 787; *Rosicato* v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353.

Of even greater significance for purposes of federal law is the treatment of these trusts under the Bankruptcy Act, where the question is whether the contractor's interest in the trust res is "property" to which the trustee takes title under Section 70a of the Bankruptcy Act, 11 U.S.C. 110a, upon the contractor's bankruptcy. The question is almost indistinguishable from that in the case at bar.[10a] In *Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842), certiorari denied, 314 U. S. 686, the Second Circuit held that the trust res is not a part of the bankrupt's estate when the contractor becomes bankrupt.[11] The court rejected the Government's contention that such a holding contravenes the priority in bankruptcy set up in Section 64a (5) of the Bankruptcy Act, 11 U.S.C. 104 (a) (5). The holding in the *Wickes* case is in accord with both earlier and more recent bankruptcy cases in New York district courts, holding that these trusts are not part of the bankrupt's estate upon the contractor's bankruptcy. *In re Treister & Son, Inc.*, 145 F. Supp. 144, 146 (S.D.N.Y.); *In re Heintzelman Construction Co.*, 34 F. Supp. 109 (W.D.N.Y.); *Albert Pick Co., Inc.* v. *Travis*, 6 F. Supp. 486 (E.D.N.Y.).

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[10a] In *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958, this Court construed "property" as used in Section 3670 consistent with its interpretation in the Bankruptcy Act, citing its construction in the Bankruptcy Act as authority for the construction in Section 3670.

[11] The Second Circuit initially determined that a genuine trust was not created by this statute, 116 F. 2d 842. This holding was based on the court's reading of New York cases which indicated that the trust did not become effective until a lien was filed. Later cases convinced the Second Circuit that its reading of these cases was erroneous, and on rehearing the court reversed itself, 121 F. 2d 415. The court's second view of the New York law was confirmed by the subsequently enacted amendments of 1942 which specifically provide for enforcement of the trust whether or not a lien was filed or could be filed. New York Lien Law, Section 36-a.

2. *The Tax Lien Precedents.* This is the first time this Court has been called upon to decide whether a trustee's interest in a statutorily-created trust is sufficient to characterize the trust res as "property" or the "right to property" for purposes of the federal tax lien law.

The most recent authority in this Court suggests that, based on the foregoing analysis of New York law, the federal tax lien does not attach to the debt because the beneficial interest did not belong to the taxpayer under New York law and hence was not the "property" of the taxpayer under federal law. *United States* v. *Bess,* Nos. 395 and 410, 1957 Term, decided June 9, 1958.[12]

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[12] A series of inapposite cases in this Court have determined the relative priority of liens: *United States* v. *Security Trust and Savings Bank,* 340 U. S. 47 (attachment lien); *United States* v. *City of New Britain,* 347 U. S. 81 (city tax lien); *United States* v. *Acri,* 348 U. S. 211 (attachment lien); *United States* v. *Liverpool & London & Globe Insurance Co., Ltd.,* 348 U. S. 215 (garnishment lien); *United States* v. *Scovil,* 348 U. S. 218 (landlord's distress lien); *United States* v. *Colotta,* 350 U. S. 808 (mechanics lien); *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010 (mechanics lien); *United Staes* v. *Vorreiter,* 355 U. S. 15 (mechanics lien). These cases are inapposite to the instant case, however, because they involve only the relative priority of liens, not the meaning of "property and rights to property." After this Court's decision in *New Britain, supra,* ruling that, as between perfected liens, "the first in time is the first in right," the subsequent cases presented only the question as to whether the particular lien had been perfected. In all of them it was assumed that the property belonged to the taxpayer, which is the question at issue here. See *Fidelity and Deposit Co. of Maryland* v. *New York Housing Authority,* 241 F. 2d 142, 145 (C. A. 2). That these Supreme Court cases have no application to the type of question presented by the instant case was recognized even in *United States* v. *Kings County Iron Works,* 224 F. 2d 332 (C. A. 2), the case relied on by the New York court for its decision in the instant case. Said the court in *Kings County:*

> . . . [T]he federal tax lien can be defeated in one of three ways. Competing lienors may establish that the property on which the Government seeks to levy is not the property of the taxpayer at all. They may claim a prior specific and per-

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The most recent lower federal court decision construing "property and rights to property" under federal law is *Fidelity and Deposit Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d 142, decided by the Second Circuit on February 8, 1957 and cited with approval by this Court in *United States* v. *Bess, supra.* Although *Fidelity and Deposit* is not on its facts squarely contrary to the case at bar, it is difficult, if not impossible, to reconcile the two cases on principle. The defaulting taxpayer in the *Fidelity* case had a contract with the New York Housing Authority on which construction had been completed. The materialmen and laborers, however, remained unpaid, and, under the contract, payments to the contractor did not become due until he supplied proof that the claims of materialmen and laborers had been satisfied. Accordingly, under the contract, no debt had arisen even though construction had been completed. The surety, Fidelity and Deposit, was called upon to satisfy these claims, which it did. It then sued, standing in the shoes of the materialmen and laborers, to recover the amount due from the New York Housing Authority to the contractor. The United States intervened with a claim on the basis of its tax lien. The Second Circuit unanimously concluded "that there were no rights of [the contractor] upon which the government tax lien could attach" (241 F. 2d at 144),

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fected lien entitled to precedence under the rule that 'the first in time is the first in right.' United States v. City of New Britain, 347 U. S. 81, 85, 74 S. Ct. 367, 370, 98 L. Ed. 520. Or, as long as the federal lien is unfiled, they may seek to bring themselves within the classes of creditors . . . which are specifically protected by I.R.C. § 3672 (224 F. 2d at 234-235).

A final case in this Court, *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587, arose under 26 U.S.C. (1952 ed.) 3672 and construed the term "mortgage" rather than "property and rights to property" as in the instant case. To the extent it is apposite to the case at bar, the per curiam reversal, over the vigorous dissent of four members of the court, only emphasizes the need for judicial clarification in this area.

because no debt arose under the contract until the materialmen and laborers had been paid.[13] The court relied on a state court case which reached the same conclusion, *United States Fidelity and Guaranty Co.* v. *Triborough Bridge Authority*, 297 N. Y. 31, 74 N. E. 2d 226.[14]

If both *Fidelity and Deposit* and the instant case are allowed to stand, it will mean that the parties can accomplish by contract what the state cannot accomplish by statute, an anomalous result indeed. The trust provisions of the New York law were enacted for the benefit of the untutored laborer and materialman. It would be strange indeed if the federal law permitted the laborer or materialman to protect himself against an outstanding tax lien on the contractor only with the aid of a lawyer clever enough to have a Fidelity-and-Deposit-clause inserted in the contract between the contractor and the owner; but denied the New York legislature power to accomplish this same result by legislation. Yet this is the result if both *Fidelity and Deposit* and the instant case are law. It is perhaps understandable that these two decisions have left the profession and the construction industry in considerable confusion; both now look to this Court for clarification.[15]

The New York Court of Appeals did not consider *Fidelity and Deposit* controlling, but instead relied on an earlier Second Circuit decision, *United States* v. *Kings*

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[13] The court rejected a contention that because the surety had paid the materialmen and laborers, a debt did arise to which the lien could attach.

[14] The court in *Fidelity and Deposit* also distinguished the line of lien cases discussed, on the ground that in those cases the question "was solely one of priorities between two existing claims" (241 F. 2d at 145). "In none of those cases was there any doubt that a federal tax lien had attached to 'property or rights to property'" (*Ibid.*).

[15] The Government did not petition for certiorari in *Fidelity and Deposit.*

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*County Iron Works, Inc.*, 224 F. 2d 232. On its facts, *Kings County* admittedly is precedent for the decision in the instant case. However, as interpreted by the Second Circuit itself in its later decision in *Fidelity and Deposit*, *Kings County* decided only that the state classification of the "reserve fund as a 'trust' [did not] preclude a federal inquiry into the nature of the right thus created." (*Fidelity and Deposit Insurance Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d at 145.) In other words, *Kings County* is authority only for the proposition that the state label is not conclusive. "The court [in *Kings County*] did not inquire whether the state had created a right [in the defaulting taxpayer]. It assumed that it did . . ." (241 F. 2d at 145). Thus by the Second Circuit's own controlling decision, *Kings County* is not authority for the proposition for which it was cited by the New York court. Accordingly, the New York court in the instant case erred in relying on *Kings County* and in ignoring the later controlling decision in *Fidelity and Deposit*. Thus the only basis for the decision below—the decision in *Kings County* —is unfounded.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.**

Respectfully submitted,

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# APPENDIX

## (a) Opinion of Court of Appeals of New York.

FULD, Judge.

This appeal, here by our permission, involves the relative priority between a mechanic's lien and a federal tax lien.

Fleetwood Paving Corporation owes the United States Government a sum of money representing unpaid withholding and social security taxes. In December, 1951 and March, 1952, the local collector received assessment lists including assessments against the taxpayer. Some short time later, Fleetwood, as general contractor, entered into an agreement with one Ada

514

Bottone to remodel a restaurant which she owned in the Town of Eastchester. Thereafter, in August and September of the same year, 1952, Fleetwood arranged for Home Maintenance Company and Colonial Sand and Stone Company to furnish labor and materials for the remodeling job.

On October 31, 1952, the United States filed a lien against Fleetwood for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the clerk of the City of Mt. Vernon, where Fleetwood maintained its place of business. Some days later, having been paid only a part of what was due them, Home Maintenance and Colonial Sand filed mechanic's liens in the county clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January, 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of Fleetwood jobs.

In June, 1953, separate suits were started by Home Maintenance and Colonial Sand to foreclose their respective liens and Bottone deposited $2,200, the amount still owing by her to Fleetwood, with the county clerk to the credit of

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th actions. On Bottone's motion, the government, which d levied against her indebtedness to Fleetwood, was terpleaded and substituted as defendant in her place.

Each of the three parties, the two plaintiffs and the gov-nment, moved for summary judgment under rule 113 of e Rules of Civil Practice. The court at Special Term anted plaintiffs' motions on the ground that the govern-ent's tax lien was ineffective since it had not been filed the county clerk's office, the place designated by statute r the recording of liens against real property. Although e Appellate Division affirmed the judgment, it disagreed th Special Term's rationale. It was the Appellate Divi-n's view that no debt was due from Bottone to Fleet-od to which the government's lien could attach: the fund posited by Bottone was a substitute for her real prop-y and, since the United States had no lien against such operty, it had no lien [2 A. D. 2d 747, 153 N.Y.S. 2d 270] pon the funds deposited in substitution therefor."

We cannot agree. On the basis of the controlling federal tute (Internal Revenue Code of 1939, U. S. Code, tit. 26, 3670, 3672, 26 U.S.C.A. §§ 3670, 3672), as well as the eral decisions construing it, the government tax lien ached to the debt owing to Fleetwood and that lien is itled to priority.

515

The Internal Revenue Code of 1939 provided, as does the sent code, a lien of exceedingly broad scope in favor of United States for unpaid taxes. The amount of the was to be "a lien * * * upon all property and rights to perty" belonging to the taxpayer and the lien "shall e at the time the assessment list was received by the ector and shall continue until the liability for such unt is satisfied" (§§ 3670-3671).

However, the statute went on to declare, "Such lien shall not be valid as against any mortgagee, pledgee,

purchaser, or judgment creditor until notice thereof has been filed by the collector * * * in the office * * * authorized by the law of the State * * * in which the property subject to the lien is situated" (§ 3672, subd. [a], par. [1]). By this state's law, the place provided for filing differs depending on whether the lien is asserted against real or personal property. In the case of a lien upon real property, the notice is to be filed in "the office of the clerk of the county in which real property subject to any such lien is situated" (Lien Law, Consol. Laws, c. 33, § 240, subd. 1), in the case of a lien upon personal property, "in the town or city where the owner * * * resides at the time the lien arises" § 240, subd. 2.

[1, 2] The "relative priority of the lien of the United States for unpaid taxes is," the Supreme Court has said, "always a federal question to be determined finally by the federal courts." United States v. Acri, 348 U. S. 211, 213, 75 S. Ct. 239, 241, 99 L. Ed. 264; United States v. Security Trust & Sav. Bank, 340 U. S. 47, 49, 71 S. Ct. 111, 112, 95 L. Ed. 53; People of State of Illinois ex rel. Gordon v. Campbell, 329 U. S. 362, 371, 67 S. Ct. 340, 345, 91 L. Ed. 348; United States v. Waddill, Holland & Flinn, 323 U. S. 353, 356-357, 65 S. Ct. 304, 306, 89 L. Ed. 294. Turning, therefore, to the federal decisions, we find the rule firmly established that, once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it. See United States v. Colotta, 350 U. S. 808, 76 S. Ct. 82, 100 L. Ed. 725, reversing 224 Miss. 33, 79 So. 2d 474; United States v. Acri, supra, 348 U. S. 211, 214, 75 S. Ct. 239, 241; United States v. Liverpool & London & Globe Ins. Co., 348 U. S. 215, 217, 75 S. Ct. 247, 248, 99 L. Ed. 268; United States v. Scovil, 348 U. S. 218, 220, 75 S. Ct. 244, 246, 99 L. Ed. 271; United States v. City of New Britain, 347 U. S. 81, 84-87, 74 S. Ct. 367, 98 L. Ed. 520; United States v. Gilbert Associates, 345 U. S. 361, 365, 73

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S. Ct. 701, 97 L. Ed. 1071; United States v. Security Trust & Sav. Bank, supra, 340 U. S. 47, 50-51, 71 S. Ct. 111; United States v. Kings County Iron Works, 2 Cir., 224 F. 2d 232, 234-235, 237.

[3] In the case before us, the government concededly filed notice of its lien, in the office of the clerk of the city where the taxpayer

516

resided, before the plaintiffs filed their notices and, since such notice of lien is indisputably effective against all personal property and rights thereto belonging to the taxpayer (Lien Law, § 240, subd. 2), decision herein depends solely on whether the indebtedness due Fleetwood from Bottone constituted property of Fleetwood.

The lien filed by the government in October, 1952, before any mechanic's lien had been recorded, was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer. It was asserted against the contractual obligation of Bottone to Fleetwood, against Bottone's indebtedness to the latter, and, quite obviously, within the statutory terms personal "property and rights to [such] property" belonging to the taxpayer (U. S. Code, tit. 26 § 3670, 26 U.S.C.A. § 3670; see United States v. Kings County Iron Works, supra, 224 F. 2d 232, 234-235, 237; cf. Fidelity & Deposit Co. of Md. v. New York City Housing Authority, 2 Cir., 241 F. 2d 142, 144-145). Since the government did all that the applicable law demanded when it recorded its notice in the city clerk's office (Lien Law, § 240, subd. 2), its tax lien is superior to any other lien subsequently filed.

[4, 5] It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. See United States v. Vorreiter, 355 U. S. 15,

78 S. Ct. 19, reversing 134 Colo. 543, 307 P. 2d 475; United States v. White Bear Brewing Co., 350 U. S. 1010, 76 S. Ct. 646, 100 L. Ed. 871, reversing 7 Cir., 227 F. 2d 359; United States v. Colotta, supra, 350 U. S. 808, 76 S. Ct. 82, reversing 7 Cir., 224 Miss. 33, 79 So. 2d 474; United States v. Scovil, supra, 348 U. S. 218, 220-221, 75 S. Ct. 244; United States v. City of New Britain, supra, 347 U. S. 81, 84-87, 74 S. Ct. 367; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237. That being so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors (§ 36-a; § 13, subd. [7]—may not be construed to affect the rights of the government or the priority of its tax lien.[1]

517

The Kings County Iron Works, case, supra, 224 F. 2d 232, also involving the question of priority between the government's tax lien and a mechanic's lien in New York, is virtually indistinguishable from the present case. There, as here, a contractor, entitled to be paid by the owner of the real property which had been improved, owed money both to the United States for unpaid taxes and to his subcontractor for work performed. There, just as here, the subcontractor filed notice of its mechanic's lien against the property about a week after the government had filed notice of its tax lien at the place where the taxpayer-contractor maintained its place of business. There, too, the property owner paid the amount in question into court for judicial determination of priority between the government and the

[1] To the extent that Cranford Co. v. L. Leopold & Co., 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580, suggests the contrary, it must give way to more recent federal decisions. See United States v. Scovil, supra, 348 U. S. 218, 221, 75 S. Ct. 244; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 235 et seq.; and other cases cited above.

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mechanic's lienor. The district court awarded the latter priority on much the same grounds as did the trial court herein (122 F. Supp. 219, sub nom. United States v. Preferred Contractors), but, on appeal, the Court of Appeals for the Second Circuit reversed. It held that the debt owing to the taxpayer was subject to federal levy and was subordinate to the federal tax lien for either of two reasons; on the one hand, because the government filed notice of its lien first and, on the other, because mechanic's lienors, not being within the class of persons protected by subdivision (a )of section 3672 of the Internal Revenue Code, are in no event entitled to challenge a federal tax lien.

[6] Likewise, in the case before us, the government tax lien must be accorded priority for it too was recorded before either Home Maintenance or Colonial Sand filed notices of their respective liens and before Colonial Sand obtained its judgment. Moreover, since Home Maintenance never did become a judgment creditor, recent Supreme Court decisions impel us to add that its lien would have been subordinate to the federal tax lien even if it had been earlier recorded. See United States v. Vorreiter, supra, 355 U. S. 15, 78 S. Ct. 19; United States v. White Bear Brewing Co., supra, 350 U. S. 1010, 76 S. Ct. 646, reversing 227 F. 2d 359; see, also, United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.

The judgment of the Appellate Division should be reversed, and the motion of the United States for summary judgment in each action should be granted.

518

Conway, C. J., and Desmond, Dye, Froessel and Burke, JJ., concur with Judge Fuld.

Van Voorhis, J., dissents and votes to affirm.

Judgment reversed and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

**(b) Judgment and Remittitur of Court of Appeals of New York.**

## COURT OF APPEALS

---

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of December in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, Clerk.

REMITTITUR December 5, 1957.

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No. 106

Action No. 1.

Robert Aquilino & ano., co-partners doing business under the firm name and style of Home Maintenance Co.,
Plaintiffs-Respondents,

vs.

United States of America,
Defendant-Appellant,

and

Fleetwood Paving Corporation,
Defendant,

and

Colonial Sand and Stone Co., Inc.,
Defendant-Respondent,

( and another action ).

Be it Remembered, That on the 3rd day of April in the year of our Lord one thousand nine hundred and fifty-seven, United of America, the defendant-appellant in both actions, came hereunto the Court of Appeals, by Paul W. Williams, its attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Robert Aquilino & ano., co-partners doing business under the firm name and style of Home Maintenance Co., the plaintiffs-respondents in Action No. 1, Colonial Sand and Stone Co., Inc., the defendant-respondent in Action No. 1 and the plaintiff-

respondent in Action No. 2, and Home Maintenance Company, the defendant-respondent in Action No. 2, afterwards appeared in said Court of Appeals by Charles S. Friedman and Jacob I. Goodstein, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Daniel F. McMahon, of counsel for the appellant—and by Mr. Harold M. Edwards, of counsel for the respondents Aquilino and Spero, and submitted by the respondent Colonial Sand & Stone Co., Inc., and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, thereto be proceeded upon according to law.

THEREFORE, it is considered that said judgment be reversed , &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York

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*Appendix*

COURT OF APPEALS, CLERK'S OFFICE,
*Albany*, December 5, 1957.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON,
Clerk.

[See amendment as per Order of April 3rd, 1958, immediately following.]

**(c) Order of Court of Appeals of New York Denying Reargument and Amending Remittitur.**

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of April A. D. 1958.

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

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Mo. No. 195

Action No. 1

Robert Aquilina & ano., co-partners doing business under the firm name and style of Home Maintenance Co.,
Plaintiffs-Respondents,

vs.

United States of America,
Defendant-Appellant,

and

Fleetwood Paving Corporation,
Defendant,

and

Colonial Sand and Stone Co., Inc.
Defendant-Respondent,

(and another action)

---

A motion for reargument or, in the alternative, to amend the remittitur in the above causes having been heretofore

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made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein, as the opinion of the Court indicates, there was presented and necessarily passed upon a question under the Constitution of the United States, namely, the construction of provisions of the Internal Revenue Code (U. S. Code, tit. 26, §§ 3670-3672). Plaintiffs argued that such provisions were not decisive or controlling. This Court held to the contrary.

AND the Supreme Court, Westchester County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

**(d) Judgment Filed in Supreme Court, Westchester County, New York on Remittitur of Court of Appeals.**

[SAME TITLE]

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Westchester, at the County Court House, White Plains, New York, on the 22nd day of May, 1958.

Present: GEORGE M. FANELLI, Justice.

The defendant, United States of America, having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of the County of Westchester, on the 27th day of August, 1957, affirming the prior order and judgment of this Court heretofore entered herein in the office of the Clerk of the County of Westchester on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying the cross-motion of defendant, the United States of America for summary judgment; striking out the answers of said defendant, and adjudging that plaintiffs in Action No. 1 have a valid lien for the sum of $1,400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund the sum of $896.25, and from each and every part of said order and judgment of affirmance as well as from the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals

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having ordered and adjudged that said judgment so appealed from as aforesaid be reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein; and the remittitur from said Court of Appeals having been filed herein and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for defendant, United States of America, it is hereby

ORDERED AND ADJUDGED, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ORDERED AND ADJUDGED, that the said order and judgment entered herein on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, be and the same hereby is reversed and the cross-motion of defendant, United States of America, for summary judgment in each action be and the same is hereby granted; and it is further

ORDERED AND ADJUDGED, that defendant, Fleetwood Paving Corp., is indebted to defendant, United States of America, in the sum of $3,523.41; and it is further

ORDERED AND ADJUDGED, that the claim of the defendant, United States of America, is prior to and superior to the claims of plaintiffs and of the other defendants in both actions herein; and it is further

ORDERED, that the Commissioner of Finance, Westchester County, pay to the defendant, United States of America,

the Two Thousand Two Hundred and no/100 Dollars ($2,200), plus accrued interest, if any, and less fees allowed by law which is on deposit with him to the credit of this action, as shown in the certificate of the Commissioner of Finance, Westchester County, attached hereto, in partial satisfaction of the taxes due from Fleetwood Paving Corp. to the United States of America, upon presentation of two certified copies of this order.

Enter:

GEORGE M. FANELLI,
J. S. C.

EDWARD L. WARREN,
Clerk

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**(e) The Federal Lien for Taxes.**

Section 3670 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3670, 53 Stat. 448, now appearing as Section 6321 of the Internal Revenue Code of 1954, 26 U.S.C. (1952 ed., Supp. II) 6321, 68A Stat. 779, provides as follows:

> If any person liable to pay any tax neglects or refuses to pay the same after demands, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 3671 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3671, 53 Stat. 449, now appearing as Section 6322, 26 U.S.C. (1952 ed., Supp. II) 6322, 68A Stat. 779, provides as follows:

> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

**(f) The New York State Lien Law.**

New York Lien Law, Section 36-a, L. 1942, c. 808, Section 4, provides as follows:

> The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 8 |
| Appendix | 9 |


## CITATIONS


Cases:

*Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142 — 5, 7

*Musser* v. *Utah*, 333 U. S. 95 — 7

*Speiser* v. *Randall*, No. 483, 1957 Term, decided June 30, 1958 — 7

*United States* v. *Bess*, No. 395, 1957 Term, decided June 9, 1958 — 8

*United States* v. *Colotta*, 350 U. S. 808, reversing 224 Miss. 33 — 5

*United States* v. *Kings County Iron Works*, 224 F. 2d 232 — 6, 7, 8

*United States* v. *New Britain*, 347 U. S. 81 — 7

*United States* v. *Vorreiter*, 355 U. S. 15, reversing 134 Colo. 543 — 6

*United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, reversing 227 F. 2d 359 — 6

Statutes:

Internal Revenue Code of 1939:

Sec. 3670 (26 U. S. C. 1952 ed., Sec. 3670) — 2, 4, 5, 9

Sec. 3671 (26 U. S. C. 1952 ed., Sec. 3671) — 2, 9

Sec. 3672 (a) (26 U. S. C. 1952 ed., Sec. 3672 (a)) — 2, 5, 9




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Statutes—Continued

Page

New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated):
Sec. 3 ..... 2, 10
Sec. 4 ..... 2, 10
New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated, 1957 Cum. Pocket Part):
Sec. 36–a ..... 2, 10
Sec. 75 ..... 2, 11

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 132

ROBERT AQUILINO AND JOSEPH SPERO, DOING BUSINESS AS HOME MAINTENANCE COMPANY, AND COLONIAL SAND AND STONE CO., INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the New York Supreme Court, Special Term (R. 76–78), is not officially reported. The opinion of the New York Supreme Court, Appellate Division, Second Department (R. 91–94), is reported at 2 App. Div. 2d 747. The opinion of the Court of Appeals of the State of New York (Pet. 18–23) is reported at 3 N. Y. 2d 511.

## JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 5, 1957. (Pet. 24.) A motion for rehearing was denied on April 3, 1958. (Pet. 28–29.) The petition for a writ of certiorari was filed on June 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

## QUESTION PRESENTED

Whether a federal tax lien, prior in time to adverse mechanics' liens, is entitled to be first paid from a balance due a taxpayer-contractor.

## STATUTES INVOLVED

Sections 3670, 3671, and 3672 (a) (1) of the Internal Revenue Code of 1939 and Sections 3, 4, 36-a, and 75, of the New York Lien Law are set forth in the Appendix, *infra,* pp. 9–11.

## STATEMENT

In December 1951 and March 1952, the Collector received assessment lists including assessments against the taxpayer, Fleetwood Paving Corporation, which have not been paid. Subsequently, the taxpayer, as general contractor, entered into an agreement with Ada Bottone to remodel a restaurant that she owned. In August and September of the same year, taxpayer arranged for the petitioners, Home Maintenance Com-

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pany and Colonial Sand and Stone Company, to furnish labor and materials for the remodeling job. (Pet. 18.)

On October 31, 1952, the United States filed notice of its lien against the taxpayer for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the Clerk of the City of Mt. Vernon, where the taxpayer maintained its place of business. (Pet. 18.)

Some days later, having been paid only a part of what was due to them, petitioners filed mechanics' liens in the Clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of taxpayer's jobs. (Pet. 18.)

In June 1953, separate suits were started by petitioners to foreclose their respective liens, and Bottone, the owner, deposited $2,200, the amount still owing by her to the taxpayer, Fleetwood, with the Clerk of the County Court to the credit of both actions. On Bottone's motion, the Government, which had levied against her indebtedness to taxpayer, Fleetwood, was interpleaded and substituted as defendant in her place. (Pet. 18–19.)

Each of the three parties moved for summary judgment, and the trial court granted the petitioners' motions, awarding their liens priority on the ground that the Government's tax lien was ineffective since it had

not been filed in the County Clerk's office, the place designated by statute for the recording of liens against real property. Although the Appellate Division affirmed the judgment, it disagreed with the lower court's rationale. It was the Appellate Division's view that no debt was due from Bottone, the owner, to Fleetwood to which the Government's lien could attach; that the fund deposited by Bottone was a substitute for her real property and, since the United States had no lien against such property, it had no lien (2 App. Div. 2d 747) "upon the funds deposited in substitution therefor." (Pet. 19.)

The Court of Appeals of the State of New York reversed on the ground that the Government's notice of lien, concededly filed before the petitioners filed their notice, was asserted against Bottone's indebtedness to the taxpayer, and not against any real property; that this indebtedness was "quite obviously within the statutory terms personal 'property and rights to [such] property' belonging to the taxpayer" (26 U. S. C. 3670); that the federal lien, having been properly recorded, is superior to any other lien subsequently filed; "that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land"; and that the New York Lien Law, providing that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors, "may not be construed to affect the rights of the government or the priority of its tax lien." (Pet. 21–22.)

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## ARGUMENT

Involved here is a federal lien which arose even before petitioners' subcontracts with the taxpayer and which was recorded before petitioners' liens were recorded.[1] Under established principles, the court below—the highest court in the State of New York—was clearly correct in according priority to the federal lien. There is no conflict and no other reason for further review.

1. Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 9) imposes a lien "in favor of the United States upon all property and *rights to property*, whether real or *personal*," belonging to the delinquent taxpayer. (Emphasis added.) The New York Court of Appeals found, according to the undisputed facts, that the owner of the improved real estate owed an existing contractual obligation to the taxpayer (Pet. 19, 21), which had fulfilled its obligations under their contract (R. 25–26, 32, 37),[2] and that this interest was a right to personal property within the meaning of Section 3670. The court further held that the federal lien, having been first in time, was entitled to priority. The decision thus is squarely in accord with the decisions in *United States* v. *Colotta*, 350 U. S. 808, reversing 224 Miss. 33, and

[1] One of the petitioners secured a judgment against the taxpayer, but that judgment was subsequent to the filing of the federal tax lien (Pet. 23) and therefore subordinate to it. Section 3672 (a) (1) of the 1939 Code (Appendix, *infra*, pp. 9–10).

[2] Compare *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142, 144–145 (C. A. 2d), discussed *infra*, pp. 7–8.

*United States* v. *Vorreiter,* 355 U. S. 15, reversing 134 Colo. 543. See also *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010, reversing 227 F. 2d 359 (C. A. 7th).

2. The question tendered by petitioners is not presented by this case. According to petitioners (Pet. 2), the question is "whether the general contractor's interest, solely as trustee, in the res of this statutorily-created trust constitutes 'property' or 'rights to property' under the federal tax lien law." Such a statement of the question presupposes that Bottone's indebtedness to the general contractor constitutes the "res" of a "trust" under the New York Lien Law (Appendix, *infra,* pp. 10–11) and that the general contractor's interest is "solely as trustee." Petitioners made that argument in the court below—the highest court in the State of New York—but it was squarely rejected. Instead, the court held that the indebtedness "quite obviously" was property "belonging to the taxpayer" (Pet. 21). And the court construed the New York Lien Law as simply establishing a rule of priority that did not affect the rights of the Government. In so holding, the court below (Pet. 22) expressly approved the "virtually indistinguishable" decision in *United States* v. *Kings County Iron Works,* 224 F. 2d 232, 235 (C. A. 2d), similarly denying that the "trust" provided by the statute divests the contractor of his property interest in his chose in action against the property owner.

In substance, petitioners contend that this construction of the New York Lien Law by the New York Court of Appeals is erroneous. This Court, however,

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has repeatedly adhered to the basic constitutional principle that "What the statutes of a State mean, the extent to which any provision may be limited by other Acts * * * are questions on which the highest court of the State has the final word." *Musser* v. *Utah,* 333 U. S. 95, 98. See also, *e. g., Speiser* v. *Randall,* No. 483, 1957 Term (slip opinion, p. 9, n. 7), decided by this Court on June 30, 1958. Moreover, if petitioners' interpretation of the state statute were adopted so as to defeat the prior federal lien, it would then be essential to consider the constitutionality of the statute thus construed; for "Obviously, the State cannot * * * impair the standing of the federal liens, without the consent of Congress." *United States* v. *New Britain,* 347 U. S. 81, 84.

3. Contrary to the petitioners' contention (Pet. 7, 15), the decision below is not in conflict with the decision in *Fidelity & Deposit Co.* v. *New York City Housing Auth.,* 241 F. 2d 142 (C. A. 2d). There, the taxpayer-contractor breached its contract with the owner—*i. e.,* a special provision requiring payment of the laborers and materialmen as a condition precedent to receipt of any part of the contract price—and New York law deprived it of any interest in the debt due by virtue of that contract; the Second Circuit accordingly held that the contractor had no right to which the federal lien could attach.[3] On that basis, the Second Circuit distinguished its decision in *United States* v. *Kings County Iron Works, supra,* which the court below characterized as "virtually indistinguish-

[3] To similar effect is the more recent decision of the court below in *Aetna Casualty & Surety Co.* v. *United States,* decided June 25, 1958.

able" from this case (Pet. 22). Here, as in *King County,* no such special contract provision was involved. Cf. this Court's decision in *United States* v. *Bess,* No. 395, 1957 Term (slip opinion, p. 4), decided June 9, 1958 ("§ 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law").

## CONCLUSION

The decision below is correct. It is in accord with applicable decisions of this Court. There is no conflict. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
CHARLES K. RICE,
*Assistant Attorney General.*
EARL E. POLLOCK,
*Assistant to the Solicitor General.*
A. F. PRESCOTT,
MELVIN L. LEBOW,
*Attorneys.*

JULY 1958.

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## APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) [As amended by Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798] *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is author-

ized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated):

SEC. 3. *Mechanic's lien on real property*

A contractor, subcontractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. * * *

SEC. 4. *Extent of lien*

* * * If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agree price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated, 1957 Cum. Pocket Part):

SEC. 36–a. *Contractor who diverts funds guilty of larceny; civil remedy to enforce trust*

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The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him.

SEC. 75. *Period of limitations*

No action to enforce a trust under this article shall be maintainable if commenced more than one year after completion of the improvement on account of which the claim arose.

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SEP 27 1958
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

---

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

---

## PETITIONERS' REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

---

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# INDEX


PAGE

POINT I ..... 1

POINT II ..... 4

CASES CITED

Amer. v. Superior Court, 344 U. S. 813 ..... 6

Busey v. District of Columbia, 319 U. S. 579 ..... 6

Cranford Co. v. L. Leopold & Co., 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580 ..... 5

Fidelity and Deposit Co. of Maryland v. New York City Housing Authority, 2 Cir., 241 F. 2d 142 ...1, 3, 4

United States v. Bess, Nos. 395 and 410, 1957 Term, decided June 9, 1958 ..... 5, 6

United States v. Durham Lumber Co., No. 7619, decided July 18, 1958 ..... 2

Wickes Boiler Co. Inc. v. Godfrey-Keeler Co., 121 F. 2d 415 (reversing 116 F. 2d 842), certiorari denied, 314 U. S. 686 ..... 2

STATUTE CITED

Section 3670 of the Internal Revenue Code of 1939 .. 4, 5

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 1099

---

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

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COLONIAL SAND AND STONE CO., INC., Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

---

## PETITIONERS' REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

---

### Point I

In our petition we pointed out that the case at bar conflicted in principle with the decision of the Second Circuit in *Fidelity Deposit Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d 142, and conflicted directly with another Second Circuit decision construing the term

"property" as used in the Bankruptcy Act, *Wickes Boiler Co. Inc.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415 (reversing 116 F. 2d 842) certiorari denied, 314 U. S. 686. Since the filing of our petition, the Court of Appeals for the Fourth Circuit rendered its decision in *United States* v. *Durham Lumber Co.*, No. 7619, decided July 18, 1958, which presents a square conflict with the instant case under the identical federal statute involved here.

The *Durham Lumber* case, as the instant case, involved a contest between the Government and subcontractors over a fund, in the hands of an owner, payable for the improvement of the owner's real property. There, as here, the Government asserted its tax lien against the earned fund as constituting "property and rights to property" belonging to the general contractor. The subcontractors, resisting this contention, asserted their property right in the earned fund, by virtue of their rights thereto under North Carolina law. The crucial provisions of the North Carolina law give the subcontractor a priority and lien on the owner's property which can be enforced by the subcontractor directly against the owner. Moreover, the owner is required to pay directly to the subcontractor all sums due him by the general contractor. It will be seen that this statutory scheme, although different in mechanics of operation, does not differ in substance from the New York law, which permits the subcontractor to enforce his right to payment directly against the owner by instituting an action to enforce his beneficial interest in the trust composed of the debt due from the owner. Moreover, payments due the subcontractor are made by the owner to the subcontractor by constituting the general contractor a trustee of these payments for the benefit of the subcontractor.

The Fourth Circuit held that under North Carolina law the subcontractors' claims are preferred to that of the general contractor; "[T]heirs [the subcontractors'] is a valuable right which is not extinguished by the tax lien

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on the property of the general contractor, whose only claim against the owners under the laws of North Carolina is for so much of the construction price as will remain unpaid after the owners have deducted a sum sufficient to pay the subcontractors." Stated differently, the court held that the only portion of the "earned fund" in the hands of the owner which constitutes "property and rights to property" of the general contractor, and is therefore reachable by the tax lien, is the amount over and above that due the subcontractors.

Of the case at bar, the Fourth Circuit had this to say:

> "In *Aquilino* v. *United States,* 3 N. Y. 2d 511, 146 N. E. 2d 774, the New York Court of Appeals reached a conclusion apparently at variance with our own. The opinion indicates no awareness of the decision in the *Fidelity and Deposit* case,[1] * * *. Had the New York Court of Appeals been informed of the decision of the Court of Appeals for the Second Circuit in *Fidelity and Deposit,* indeed had it felt at liberty to accord full recognition to the state-created right of the subcontractor against the owner, it may have reached a different conclusion.
>
> That the Court of Appeals of New York should have accorded greater recognition to the state created rights is strongly indicated by the very recent case of *United States* v. *Bess,* ——U. S. ——, —— S. Ct. ——, —— L. Ed. —— (decided June 9, 1958) in which it was held that the tax lien could attach only to such rights as had been created and limited by state law. Section 3670, it was said, merely attaches federally defined

[1] The uncorrected opinion of the New York Court of Appeals, which receives a limited circulation, indeed made no reference to *Fidelity and Deposit.* Apparently it was this opinion to which the Fourth Circuit here referred. The final version of the New York court's opinion in Aquilino was identical with the uncorrected opinion except for the insertion of "*cf. Fidelity and Deposit Co. of Maryland v. New York City Housing Authority,* 2 Cir., 241 F. 2d 142, 144-145."

consequences to state created rights. In stating the proposition, the Supreme Court cited with approval the decision of the Court of Appeals for the Second Circuit in *Fidelity and Deposit, supra.* Had the New York Court of Appeals adopted the same approach in *Aquilino,* it hardly could have avoided the conclusion that where the state created right of the general contractor was at all times secondary and subordinate the attachment of the tax lien does not elevate it to a status of primacy and preference."

## Point II

In its brief in opposition, the Government has chosen not to consider petitioners' case on the merits. It has failed to discuss the question presented by the petition, namely, whether the taxpayer's interest as trustee in the statutory trust created by New York amounts to "property" or "rights to property"[2] under *federal law.* Instead the Government suggests that the New York court has disposed of this case on the basis of *state law,* and that therefore no proper federal question is presented to this Court. The Government contends that instead of construing the trust fund provisions as a true trust, "the [New York] court construed the New York Lien Law [containing the trust fund provisions] as simply establishing a rule of priority * * *" (Br. in Opp. 6). *This is simply not so,* as a reading of the Court of Appeals decision will show. Nowhere does the New York court suggest that these trust fund provisions simply establish a rule of priority.

Rather, the Court of Appeals decision is based squarely on federal decisions. Said the New York Court of Appeals:

> "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of

[2] Section 3670 of the Internal Revenue Code of 1939.

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> the United States to levy and collect taxes uniformly throughout the land [citing six federal decisions]. That being so, it follows that the provision of this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds for the payment of subcontractors' (Sec. 36-a; Sec. 13, subd. [7]—*may not be construed* to affect the rights of the government or the priority of its tax lien. (Emphasis supplied.) (Pet. App. 21-22)"

It is thus clear that the decision below is based on the court's belief that it did not have the power to construe the New York trust fund provisions, for the purpose of this federal law, as vesting the beneficial interest in the trust in petitioners here. If any further proof of this fact were needed, it may be found in a footnote to that portion of the decision quoted above in which the Court states that one of its own opinions[3] suggests a "contrary" construction, but "it must give way to more recent *federal decisions*" (Emphasis supplied.) (Pet. App. 22).

As we have demonstrated in our petition (Pet. 14, n. 12), the federal decisions on which the New York court relied are not applicable to the question of what constitutes "property and rights to property" under Section 3670 of the Internal Revenue Code of 1939. See *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958. The Supreme Court cases relied on by the New York court ruled that the question of when a state-created lien becomes perfected or choate is a question of federal law, regardless of whether or not the state considers it perfected. However, subsequent to the decision in the instant case, this Court ruled in *United States* v. *Bess, supra*, that

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[3] *Cranford Co.* v. *L. Leopold & Co.*, 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580.

the determination of what constitutes "property and rights to property" under federal law must be determined by reference to state law:

> "Sec. 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law." (*United States* v. *Bess, supra*)

## Point III

In view of these subsequent decisions and in view of the fact that the Government apparently now agrees that if New York created a true trust by this statute, then the taxpayer has no "property" interest in the fund under federal law, the Court may wish, as an alternative simply to granting the writ, to vacate the judgment and remand the case to the New York Court of Appeals for reconsideration in light of the *Bess* decision (cf. *Busey* v. *District of Columbia,* 319 U. S. 579; *Amer.* v. *Superior Court,* 344 U. S. 813).

Respectfully submitted,

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FILED
AUG 22 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

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ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR THE PETITIONERS

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## INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 3 |
| Summary of Argument | 5 |
| Argument | 9 |
| A. The Statutory Trust | 10 |
| B. The Mechanic's Lien | 25 |
| C. Lien Priority | 27 |
| Conclusion | 34 |
| Appendix: | |
| (a) The Federal Lien for Taxes | 35 |
| (b) The New York State Lien Law | 38 |


### CITATIONS

*Cases:*


*Aetna Cas. & Sur. Co.* v. *United States*, 4 N. Y. 2d 639 ..... 13, 20

*Albert Pick Co., Inc.* v. *Travis*, 6 F. Supp. 486 .. 17

*Barter* v. *Hawksworth*, 102 Misc. 242, 169 N.Y.S. 475 ..... 14

*Bray Bros.* v. *Maine Trust Co.*, 35 N.Y.S. 2d 356 ..... 15

*Century Indemnity Co.* v. *Bank of Gowanda*, 35 N.Y.S. 2d 396, affd. 263 App. Div. 1068, 35 N.Y.S. 2d 463 ..... 15

PAGE

*Commissioner* v. *Stern*, 357 U. S. 39 ..... 8, 29
*Corbin-Kellogg Agency, Inc.* v. *Tasker*, 248 App. Div. 58, 289 N. Y.S. 156 ..... 6, 14, 33
*Cranford Co.* v. *L. Leopold and Co.*, 298 N. Y. 676, 82 N. E. 2d 580, affirming 273 App. Div. 754, 75 N.Y.S. 512, affirming 189 Misc. 388, 70 N.Y.S. 183 ..... 15

*Einach's Estate, In re*, 1 Misc. 2d 537, 146 N.Y.S. 2d 240 ..... 6, 14
*Ellis' Estate, Matter of*, 110 Misc. 192, 179 N.Y.S. 873 ..... 14
*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 ..... 12
*Fidelity and Deposit Company of Maryland* v. *New York Housing Authority*, 241 F. 2d 142 ..... 6, 7, 10, 18, 19, 20
*Franklin, Matter of*, 26 Misc. 107, 56 N.Y.S. 858 14

*Heintzelman Construction Co., In re.*, 34 F. Supp. 109 ..... 17

*Herrmann* v. *Rogers*, 358 U. S. 332 ..... 9

*Morgan* v. *Commissioner*, 309 U. S. 78 ..... 6

*Powers' Estate, Matter of*, 75 Misc. 85, 134 N.Y.S. 967 ..... 14

*Rosicato* v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353 ..... 15

*Stiles' Estate, In re*, 126 Misc. 715, 215 N.Y.S. 134 14

*Treister & Sons, Inc., In re*, 145 F. Supp. 144 .. 17

*United States* v. *Acri*, 348 U. S. 211 ..... 31
*United States* v. *Bess*, 357 U. S. 51 6, 7, 9, 12, 13, 16, 18, 26
*United States* v. *City of New Britain*, 347 U. S. 81 ..... 30

COPY BOUND CLOSE IN CENTER

PAGE

*United States* v. *Colotta*, 350 U. S. 808 ..... 31
*United States* v. *Gilbert Associates*, 345 U. S. 361 30
*United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232 .....7, 18, 19, 32
*United States* v. *Liverpool & London & Globe Insurance Co.*, 348 U. S. 215 ..... 31
*United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 ..... 15
*United States* v. *Scovil*, 348 U. S. 218 ..... 31
*United States* v. *Security Trust and Savings Bank*, 340 U. S. 47 .....8, 12, 25, 27, 28, 30
*United States* v. *Vorreiter*, 355 U. S. 15 .....25, 31
*United States* v. *White Bear Brewing Co.*, 350 U. S. 1010 ..... 31

*Wade* v. *Nassau Suffolk Lumber and Supply Corp.*, 275 App. Div. 864, 89 N.Y.S. 2d 294 .. 15
*Waldman* v. *D. & V. Plumbing & Heating Contractors, Inc.*, 102 N.Y.S. 2d 787 .....6, 8, 13, 33
*Washington Square Slum Clearance, In re* v. *United States* v. *Coblentz*, 5 N. Y. 2d 300 ..6, 9, 13
*Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842 certiorari denied, 314 U. S. 686 ..... 7, 16

tutes:

Bankruptcy Act:

Section 64 a (5), 11 U.S.C. 104 a (5) .....7, 8, 16
Section 70 a, 11 U.S.C. 110 a .....6, 8, 15, 16

Internal Revenue Code of 1939:

Section 3670, 11 U.S.C. (1952 ed.) 3670 ..2, 3, 8, 9, 10, 11, 15, 16, 17, 19, 21, 27, 28, 29, 32
Section 3671, 26 U.S.C. (1952 ed.) 3671 ...3, 17, 27
Section 3672, 26 U.S.C. (1952 ed.) 3672 ...8, 14, 15, 17, 18, 27, 28, 32

PAGE

Internal Revenue Code of 1954:
Section 6321, 11 U.S.C. (1952 ed., Supp. II) 6321 ..... 3
Section 6322, 11 U.S.C. (1952 ed., Supp. II) 6322 ..... 3
Section 6323, 11 U.S.C. (1952 ed., Supp. II) 6323 ..... 3

New York Lien Law:
Section 3 ..... 4,10
Section 36a (Repealed L. 1959 c. 696, § 14) . . 3, 4, 6, 10, 11, 13, 15, 16 22, 23, 24
Section 55 ..... 7, 25
Section 56 ..... 7, 25
Section 70, L. 1959, c. 696 ..... 11, 24
Section 71, L. 1959, c. 696 ..... 11

31 U.S.C. 191 (R. S. 3466) ..... 14 27, 28, 30

Miscellaneous:
"Act, Recommendation and Study relating to the Fund Provisions of the Lien Law," 1942 Report, New York State Revision Commission ..... 6, 12
Black's Law Dictionary, 3rd Ed. ..... 32
Brief for United States in Opposition to Petition for a Writ of Certiorari, *Aquilino* v. *United States*, ..... 9, 13
H. R. Report No. 1018, 62nd Cong., 2d Sess. (1912) ..... 8, 28, 29
Scott on Trusts, 1956 Ed., Vol. II, § 120 ..... 22
Scott on Trusts, 1956 Ed., Vol. IV, § 30.2 22
"Trust Fund Provisions of the Lien Law", 1959 Leg. Doc. No. 65(F) ..... 11, 24

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

---

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and EPH SPERO, doing business as HOME MAINTENANCE CO.

---

## BRIEF FOR THE PETITIONERS

---

### Opinions Below

he opinion of the New York Court of Appeals (R., p. is reported at 3 N. Y. 2d 511, 146 N. E. 2d 774. The ion of the Appellate Division, Second Department

(R. 62) is reported at 2 A. D. 2d 747, 153 N.Y.S. 2d 268. The opinion of the Supreme Court, Westchester County (R. 52) is reported at 140 N.Y.S. 2d 355.

## Jurisdiction

The judgment of the New York Court of Appeals was entered on December 5, 1957 (R. 70). A motion for rehearing was denied and the remittitur amended on April 3, 1958 (R. 72). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## Question Presented

Section 3670 of the Internal Revenue Code of 1939 imposes a tax lien on all "property and rights to property" of a defaulting taxpayer. Under New York law, "the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him", arising from the improvement of real property, constitute trust funds for the benefit of subcontractors, laborers and materialmen, to the extent of their unpaid claims for the work, labor, services and material, the furnishing and rendition of which created the credit-fund or moneys paid over.

The question presented is whether the general contractor's interest, solely as trustee, in the res of this statutorily-created trust constitutes "property" or "rights to property" under the federal tax lien law.

## Statutes Involved

The pertinent provisions of the federal tax lien law and the New York law are set forth in an appendix, *infra*, pages 35-38.

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## Statement

Petitioners are subcontractors, laborers and materialmen who are statutory beneficiaries of a trust under New York Lien Law, Section 36-a, *infra*, page 38. They instituted two separate suits in the New York Supreme Court, Westchester County, to enforce their rights under the Lien Law. By stipulation of counsel, the two cases were heard and tried together both in the trial court and in the subsequent appeals (R. 48).

The undisputed facts may be summarized as follows: On December 27, 1951, the Collector of Internal Revenue, Albany District, received an assessment for unpaid withholding taxes against Fleetwood Paving Corporation in the amount of $4,464.70 (R. 46). On March 21, 1952 the Collector received an additional tax assessment against Fleetwood, this time in the amount of $3,168.00 (R. 46). Under the provisions of 26 U.S.C. (1952 ed.) and 3670 and 3671,[1] *infra*, page 35, the United States obtained a statutory lien on all the taxpayer's "property and rights to property" by virtue of the Collector's receipt of these assessments.

Subsequently, the taxpayer contracted with Mrs. Ada Bottone to make certain improvements on her newly-acquired restaurant which she styled Mario's Miramare Restaurant (R. 43).[2]

On August 25, 1952, the taxpayer entered into a subcontract with petitioners Aquilino and Spero, doing business as Home Improvement Company (R. 19), under which these petitioners agreed to rebuild the front porch and

---

[1] These provisions are incorporated in the Internal Revenue Code of 1954 as 26 U.S.C. (1952 ed., Supp. II) 6321 and 6322.

[2] The exact date of this contract does not appear in the record. However, it necessarily occurred subsequent to July 8, 1952, the date on which Ada Bottone acquired title to the restaurant (R. 43). In any event, the exact date of this contract is immaterial.

reservice the walls, floor and steps of the side porch of Mrs. Bottone's restaurant (R. 19). Petitioners Aquilino and Spero performed the subcontract, but remain unpaid in the amount of $1400.00 (R. 17). Under New York Lien Law, Section 36-a, petitioners Aquilino and Spero are beneficiaries of a trust consisting of (a) the right of action for moneys due or to become due to the contractor from Mrs. Bottone, and (b) any moneys actually paid to him, and under New York Lien Law, § 3, they have a lien against the real property improved, and they subsequently instituted this suit to enforce their rights (R. 15-19).

Sometime between October 2 and October 8, 1952, petitioner Colonial Sand and Stone Co., Inc. sold to the taxpayer, Fleetwood, some stone and cinders for use in the construction which the taxpayer had undertaken in connection with its contract with Mrs. Bottone (R. 40). The agreed purchase price for this material was $896.25 (R. 40). The taxpayer failed to pay Colonial (R. 40) and it too filed suit to enforce its rights under the New York Lien Law (R. 22-27).

In her answer in each of the actions, Mrs. Bottone admitted that she owed $2,200.00 for the improvements made by petitioners as subcontractors and materialmen of the defaulted taxpayer, but stated that the United States had served notice of its assertion of a tax lien against such fund (R. 20-21, 28-29). She then filed a motion requesting that both actions be dismissed as to her upon her deposit of the $2200.00 with the Clerk of the County, and that the United States be substituted as a party defendant in view of its assertion of a right to the fund superior to petitioners' (R. 32-33). The motion was granted, and the court ordered deposit of the $2200.00 with the Clerk of the County, the substitution of the United States as party defendant, and service of the order on the United States (R. 32-33). The Government subsequently filed answers in each suit asserting that its tax lien gave it rights in the fund superior to

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petitioners' (R. 33-38). By stipulation of the parties, both cases were heard and tried together (R. 31).

Petitioners Aquilino and Spero, petitioner Colonial Sand and Stone Co., Inc. and the Government each moved for summary judgment (R. 8-10, 38-39, 45). The trial court ruled that petitioners' interest in the fund, which consisted of the money deposited with the Clerk, prevailed against the Government's tax lien and ordered pro rata distribution of the money between petitioners Aquilino and Spero and petitioner Colonial Sand and Stone Co., Inc. (R. 52-53). The Government appealed to the Appellate Division of the Supreme Court which affirmed (R. 62-64). A unanimous court ruled that "there is, at present, no debt due and owing from Bottone to [the taxpayer] to which [the Government's] lien may attach" (R. 63). The Government thereupon appealed to the New York Court of Appeals, which reversed, ruling that the funds, constituting Mrs. Bottone's indebtedness for the improvements made to her restaurant by the petitioners were "quite obviously within the statutory terms 'property and rights to [such] property' belonging to the taxpayer" (R. 68). While indicating in a footnote that one of its own opinions suggests a contrary conclusion, the court felt obliged to follow what it considered to be indications in the opposite direction in more recent federal opinions (R. 69). Van Voorhis, J., dissented. Petitioners' motion for rehearing was denied but on petitioners' motion the remittitur was amended (R. 72-73). The petition herein for a writ of certiorari to the Court of Appeals of the State of New York was granted on February 24, 1959 (R. 82).

## Summary of Argument

A. Determination of what constitutes "property" or "rights to property" when applying § 3670, 11 U.S.C. 3670 may be made only by reference to state law, since the federal lien statute "creates no property rights but merely

attaches consequences, federally defined, to rights created under state law * * *." *United States* v. *Bess*, 357 U. S. 51, 55. See also, *Fidelity & Deposit Co. of Md.* v. *New York Housing Auth.*, 241 F. 2d 142 (C. A. 2); *In Re Washington Square Slum Clearance, United States* v. *Coblentz*, 5 N. Y. 2d 300; *Morgan* v. *Commissioner*, 309 U. S. 78.

B. 1. § 36-a of the New York Lien Law created a statutory trust having as its res any payment or the right of action therefor arising from the improvement of real property for the benefit of subcontractors, mechanics or materialmen. This trust is enforceable by civil action brought by any beneficiary "* * * whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement." Diversion of the trust funds by the contractor [here, taxpayer] was constituted a felony. The trustee, was, therefore, burdened with "* * * all the obligations of a trustee of an express trust." 1942 Report, New York State Law Revision Commission, page 308. Until the decision of the New York Court of Appeals in this case, this trust was accorded as much or more dignity as an express trust. See *Waldman* v. *D & V Plumbing & Heating Contractors, Inc.*, 102 N.Y.S. 2d 787; *Corbin-Kellog Agency, Inc.* v. *Tasker*, 248 App. Div. 58, 289 N.Y.S. 156; *In re Einach's Estate*, 1 Misc. 2d 537, 146 N.Y.S. 2d 240. It is clear in the light of New York law that no beneficial interest to the funds in question in favor of the contractor [here, taxpayer] existed, and, therefore, he had no "property" or "rights to property" in the fund in question to which the federal lien could attach. The status and effect of this trust has been recognized in cases dealing with the administration of the Federal Bankruptcy Act, and the trust funds have been held to be beyond the reach of the trustee in bankruptcy under § 70a, 11 U.S.C. 110, since they are not the funds of the bankrupt contractor, this despite the priority afforded the govern-

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ment under § 64a(5), 11 U.S.C. 104(a)(5). *Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415. The New York Court of Appeals in the instant case felt constrained to ignore the property rights created by New York law, stating that state law "may not be construed to affect the rights of the government or the priority of its tax lien" (R. pp. 68, 69). This result was reached by an erroneous reliance on *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C. A. 2), which has been limited by *Fidelity & Deposit Co. of Md.* v. *New York Housing Auth.*, *supra*, to the proposition that state classification of the "reserve fund as a 'trust' [did not] preclude a federal inquiry into the nature of the right thus created" (241 F. 2d at 145). The court in the *Fidelity & Deposit* case recognized that the court in *Kings County* did not inquire into whether an interest in the property in favor of the contractor was created under state law, but assumed that it did. This court recognized in the *Bess* case, *supra*, that such an assumption is unwarranted and that the inquiry above referred to is necessary. Had the court below made the necessary inquiry it would have found that no interest in the funds existed under state law in favor of the contractor, and, as a result, no lien on the fund in question could arise in favor of the government.

2. The fund in question was deposited with the court in substitution for the owner's real property under § 55 of the New York Lien Law, and the government has no more right to a lien upon the deposit-fund than it would to a lien upon the real property itself. Here, the real property did not belong to the contractor [taxpayer], and any interest the contractor [taxpayer] might have had in the real property through its mechanic's lien is specifically subordinate and inferior to the lien of subcontractors, mechanics and materialmen from the moment the lien comes into existence. § 56, New York Lien Law. The rights of the government cannot rise higher than the rights of the taxpayer, and, as a result, are subordinate to the rights of the petitioners herein.

C. 1. The court in *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47, erred in equating § 3670, 11 U.S.C. 3670, to R. S. 3466, 31 U.S.C.A. § 191, since the latter section affords the government priority of *payment* in a situation where it is known that the assets of the taxpayer will be insufficient to meet his obligations, while § 3670 was enacted to preserve the status quo and prevent the taxpayer from divesting himself of his assets where no known insolvency exists. All which is required is to prevent this voluntary transfer of assets by the taxpayer since should the taxpayer become insolvent or bankrupt the government is specifically afforded priority by R. S. 3466 and § 64a(5) of the Bankruptcy Act, 11 U.S.C. 104(a)(5). It was not intended to afford the federal lien priority over all other liens; the legislative report stating: "[t]here is no reason why the government should not occupy the same position with reference to liens on property as does the individual." H. R. Report No. 1018, 62nd Cong., 2d Sess., 1912. § 3670 creates a lien in favor of the government for unpaid taxes; neither that section nor § 3672 purports to establish any order of priority favoring said lien.

2. In the absence of a manifestation of congressional intent to override state law, as in this case, state law must be applied. See *Commissioner* v. *Stern*, 357 U. S. 39. Applying state law in the instant case, the mechanic's lien is entitled to prevail, as set forth above. In addition, the federal lien requires, in the implemenation of its purposes, no more effect than that afforded to the lien of a judgment creditor—the same lien granted by § 70a of the Bankruptcy Act to a trustee in bankruptcy. It is clear that under applicable law, namely New York law, the mechanic's lien is entitled to prevail. *Waldman* v. *D & V Plumbing & Heating Contractors, Inc., supra.* The lien cases decided upon the authority of Security Trust should not be applied since they deal either with insolvency situations or are based upon an incorrect interpretation of the purposes of the federal lien statutes.

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The present status of the law in this area leads to much uncertainty in the commercial community. Setting aside to the government all property to which the federal lien attaches (should the court determine, contrary to petitioner's contention, that the lien attached to the fund in question) without the necessity of filing said lien, prevents a subcontractor, mechanic or materialman from performing work, labor or services with confidence in the fact that he will be paid therefor. Since the fund in question arises by virtue of the efforts of the subcontractors, mechanics and materialmen, justice requires that the fund be allocated to them, not to the payment of debts of others arising from totally unrelated transactions.

## Argument

"Property" or "Rights to Property"—the res belonging to a taxpayer upon which a federal tax lien may be impressed under the provisions of § 3670—may be determined only by primary reference to applicable state law. This court has recognized that there is no overriding body of substantive federal law in this area, and that the federal lien statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law * * *." *United States* v. *Bess*, 357 U. S. 51, 55.[1]

Subsequent to its decision in the instant case, the New York Court of Appeals in *In Re Washington Square Slum Clearance, United States* v. *Coblentz*, 5 N. Y. 2d 300, has likewise recognized the validity of this proposition. In the *Coblentz* case, the court found the federal statute relating to seizure of an alien's assets closely analogous, in that the statute there also relates to property or rights to property. 50 U.S.C. App. §§ 1 *et seq.* It cited two recent decisions of this court,[2] which held the determination of what consti-

[1] The government does not dispute this contention. See *Brief for the United States in Opposition, Aquilino* v. *United States*, p. 8.

[2] *Herrmann* v. *Rogers*, 358 U. S. 332.

tuted "property or rights to property" under the alie
property statute to be a matter to be determined by refer
ence to state law, as authority for its reliance upon stat
law when determining the effect of § 3670 (5 N. Y. 2d a
308). This principle was also recognized in *Fidelity an*
*Deposit Co. of Md.* v. *New York Housing Auth.*, 241 F. 2
142 (C.A. 2), which was cited with approval by this cour
(*United States* v. *Bess*, 357 U. S. at 55). These recen
decisions in this court make it eminently clear that th
state law of property is determinative of the "property
rights" of the taxpayer [contractor] to which a federa
tax lien may attach. Therefore, our first inquiry must b
whether a "property right" to the funds in question exist
under New York law in favor of the taxpayer.

The New York Lien Law grants two independent, con
current rights to a subcontractor, mechanic or materialma
who remains unpaid after furnishing work, services or ma
terials for the improvement of real property; (A) he i
the beneficiary of a statutory trust which has as its re
any funds, or the right of action therefor, which arise b
reason of the improvement,[3] *and*, (B) he is entitled to
lien against the real property which was improved.[4] Thes
are completely independent rights in completely independ
ent items of property; the lien is an interest in the rea
property improved; the trust res consists of the paymen
*or the right to receive the payment* for the improvement.
claimant may pursue, concurrently and in separate pro
ceedings, his rights in the improved property and hi
interest in the trust funds.

**A. The Statutory Trust:**

The fundamental "property rights" in funds or th
right of action therefor arising from the improvement o
real property by contractors, subcontractors and material
men were set forth in § 36a of the New York Lien Law

[3] § 36-a, New York Lien Law.
[4] § 3, New York Lien Law.

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as amended by L. 1942, c. 808, § 4. This section was repealed by L. 1959, c. 696, § 14 eff. September 1st, 1959 and new §§ 70 and 71 substitued therefor. A note (p. 974, McKinney's Session Laws of New York, 182nd Sess., Reg. Sess., 1959) explains that these sections essentially restate the provisions of former §§ 4-a, 13(7), 25-a, 25-b, 36, 36-a and 36-b "declaring that certain funds and the right to receive them are trust funds in the hands of • • • a contractor or subcontractor for the improvement of real property or a public improvement. • • •" See also "Trust Fund Provisions of the Lien Law," 1959 Leg. Doc. No. 65(F).

For the purposes of determining whether the funds in question constitute "property" or "rights to property" of the taxpayer within the meaning of § 3670, and therefore reachable by the federal tax lien, we must determine what interests in the funds are created by state law before the "property rights" referred to in said section can be ascertained. However, where no interest exists under state law, no "property" or "right to property" in the taxpayer may be created by process of interpretation of § 3670.

Section 36-a provided: "The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement. • • • [T]he trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him." § 36-a further provided for the enforcement of this trust by civil action by any beneficiary "• • • whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement." The statute identifies the trust assets, designates the class of beneficiaries, establishes a trustee, and sets forth sanctions ensuring that the trust purposes will not be defeated by diversion of the trust funds.

Diversion of the trust funds to other uses was constituted a felony: "[A]ny contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and is punishable as provided in Section thirteen hundred and two of the penal law" (*ibid.*).

It is apparent from a reading of the statute that the term "trust" is not applied merely as a label—the trustee herein is burdened with "• • • all the obligations of a trustee of an express trust." 1942 Report, New York State Law Revision Commission, 308.

These trust provisions have been continually revised with but one objective, to wit, the more complete protection of the beneficiaries specified therein. The legislative history of the Trust Fund provisions is set forth in detail in "Act, Recommendation and Study relating to the Trust Fund Provisions of the Lien Law," 1942 Report, New York State Law Revision Commission 271-336.

In every case where this trust has been subject to judicial scrutiny it has been accorded even greater force than an express trust—*until the decision in the case at bar.* The New York Court of Appeals in the instant case felt compelled to reach its decision herein by the line of inapposite cases in this court commencing with *United States* v. *Security Trust* (See *post* p. 27). It stated "• • • [T]he provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36-a; § 13, subd. [7])—may not be construed to affect the rights of the government or the priority of its tax lien." It thus decided that its own sovereign state *may not* create property rights in the funds which will be superior to those of the contractor—a proposition which is manifestly untrue as this court recognized in *United States* v. *Bess, supra,* Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. Should the State of

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New York see fit, as it did, to withhold from the contractor any beneficial interest in the fund, the federal lien cannot attach thereto. The rights of the government cannot rise higher than the interest of the taxpayer. As this court stated in the *Bess* case, "[i]t would be anomalous to view as property subject to the lien proceeds never within the insured's [here, contractors] reach to enjoy . . ." (357 U. S. 55, 56). The New York Court of Appeals did not recognize this distinction—it assumed that a property right in the taxpayer existed and proceeded to accord priority to the federal lien.

Since its decision in the instant case, the New York Court of Appeals has recognized that "[t]itle to property and right to property are exclusively a matter of state law." *In Re Washington Square Slum Clearance, United States* v. *Coblentz,* 5 N. Y. 2d 300, 308. It is aware that "[t]he determination of what constitutes property on the date of the asserted lien by the government is a matter of State Law" (5 N. Y. 2d at 314). In addition to citing *Aetna Cas. & Sur. Co.* v. *United States,* 4 N. Y. 2d 639 and *Bess* as authority for this proposition, the court goes on to cite this case: "• • • *Aquilino, supra,* petition for certiorari granted, No. 132, Feb. 24, 1959, 27 U. S. Law Week 3231" (5 N. Y. 2d at 314). It is fair to assume that were the New York Court of Appeals again presented with this case, it would feel compelled to pass upon the question of "right to property" under state law; a question which, as will be demonstrated, must be resolved in favor of the petitioner. The court felt compelled to ignore this question in the case at bar on the grounds that state law "may not be construed to affect the rights of the government or the priority of its tax lien" (R. pp. 68-69). The court now appears to realize the error of this assumption.

In *Waldman* v. *D & V Plumbing & Heating Contractors, Inc.,* 102 N.Y.S. 2d 787, the trust fund was held beyond the reach of a judgment-creditor of the contractor seeking to levy against it through proceedings supplementary to judg-

ment. The court held that since the judgment-creditor did not establish that his claim arose for labor or materials, he had no right to the trust fund. Incidentally, this same judgment-creditor would be accorded priority over an unfiled or later filed federal lien under § 3672. This same result was reached in *Corbin-Kellog Agency, Inc.* v. *Tasker*, 248 App. Div. 53, 289 N.Y.S. 156, where the court ruled, *inter alia*, that "The money due the judgment-debtor from the owner of the property improved constituted a trust fund belonging to laborers and materialmen. Lien Law, Section 36-a." As a result, the judgment-creditor was unable to reach the debt.

In *In re Einach's Estate*, 1 Misc. 2d 537, 146 N.Y.S. 2d 240, the trustee of a similar statutory trust died insolvent. The question presented was whether the trust assets were to be segregated for the statutory beneficiaries, or whether they were subject to a charge for administration expenses. Under New York Law, administration expenses are *charges* against the estate rather than *debts*, and therefore take precedence even over the priority claims of the state.[5] Nevertheless, the court held that the trust funds were to be set aside for the statutory beneficiaries, free from charges against the insolvent estate. Certainly the state's intention to create property interests in the statutory beneficiaries to the exclusion of the trustee cannot be more eloquently expressed than this case which upholds the trust as against claims which are superior to the claims of the state itself. Furthermore, at least one New York court has accorded these administration charges priority over tax claims of the United States, on the ground that only debts are subordinated to the federal claim by 31 U.S.C. 191 (RS 3466).[6]

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[5] *In re Einach's Estate*, 1 Misc. 2d 537, 146 N.Y.S. 2d 240, 242; *Matter of Franklin*, 26 Misc. 107, 56 N.Y.S. 858; *Matter of Ellis' Estate*, 110 Misc. 192, 179 N.Y.S. 873; *Barter* v. *Hawksworth*, 102 Misc. 242, 169 N.Y.S. 475; *Matter of Powers' Estate*, 75 Misc. 85, 134 N.Y.S. 967.

[6] *In re Stiles Estate*, 126 Misc. 715, 215 N.Y.S. 134.

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While *Cranford Co.* v. *L. Leopold Co.*, 298 N. Y. 676, 82 N. E. 2d 580, is no longer authority for the proposition that the mechanic or materialman is, by virtue of the Lien Law, § 36-a, a "purchaser" within the meaning of RS 3672,[7] it does further emphasize the broad reading accorded the statute by the New York courts. As set forth above, the legislature of New York has created a specific trust for the benefit of the classes set forth therein; the courts of New York have meticulously accorded this trust every effect due to an express trust, and have unfailingly granted a liberal construction to the statute. See also *Wade* v. *Nassau-Suffolk Lumber and Supply Corp.*, 275 App. Div. 864, 89 N.Y.S. 2d 294; *Rosicato* v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353.

In at least one respect the statutory trust is deemed more effective than an express trust. If one diverts the assets of an express trust, the assignee may show that the consideration for the transfer went to enhance the trust assets, and is entitled to credit for that amount. See Restatment, Trusts, Section 291. Also, *Bray Bros.* v. *Maine Trust Co.*, 35 N.Y.S. 2d 356. However, this application of general trust law was rejected by the New York courts in passing upon the effect of a statutory trust, as here, and the assignee is entitled to no such credit. *Century Indemnity Co.* v. *Bank of Gowanda*, 35 N.Y.S. 2d 396, affd. 263 App. Div. 1068, 35 N.Y.S. 2d 463.

As this court has indicated, § 3670 does not *create* property rights in the taxpayer, and where, as here, none exist under state law, the federal lien does not attach to the property in question.

For the purposes of federal treatment of this statutory trust, the question whether the trust res is "property" of the contractor to which a trustee in bankruptcy takes title under Section 70a of the Bankruptcy Act, 11 U.S.C.

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[7] This is contrary to *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587.

110, upon the contractor's bankruptcy, is virtually indistinguishable from the case at bar. In *neither* case are we concerned with the relative priority of a federal or private lien; in *both* cases the sole concern is whether the trust assets constitute "property" of the contractor. This court has recently recognized the similarities in construction of the term "property" in § 3670 and in the Bankruptcy Act, citing its construction in the latter act as authority for its construction in the former. *Bess* case, *supra*. The priority granted the federal claim for taxes in Section 64a(5) of the Bankruptcy Act, 11 U.S.C. 104(a)(5), when read in conjunction with the provisions of § 70a giving the Trustee in Bankruptcy the lien of a judgment creditor on all the assets of the bankrupt, is closely analogous to the lien granted the federal claim for taxes by § 3670. In both situations the question of relative priority of lien between the government and a third party is extraneous to the issue—relative rights to property between the contractor and a third party are the questions presented.

In *Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842), certiorari denied, 314 U. S. 686, the Second Circuit held that the trust res is *not* a part of the bankrupt's estate when the contractor becomes bankrupt.[8] The government contended therein that such a holding contravened the priority of § 64a(5) of the Bankruptcy Act, 11 U.S.C. 104(a)(5), and such contention was rejected. The court recognized that, as here, the question presented was one of property rights rather than

[8] The Second Circuit initially held that a genuine trust was not created by this statute, 116 F. 2d 842. This holding was based upon the court's reading of New York cases indicating that the trust was not effective until a lien was filed. This is consistent with the government's argument in the tax lien cases that the federal lien is superior to any "inchoate" interest. However, on rehearing the court reversed itself on the basis of later precedent indicating that the filing of a lien was not a prerequisite to the enforcement of the trust. The court's second view of the New York cases was confirmed by statutory amendment in 1942, specifically providing for enforcement of the trust whether or not a lien was, or could be, filed. New York Lien Law, § 36-a.

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priority. The holding in the *Wickes* case is in accord with both earlier and more recent bankruptcy cases in the New York district courts, all holding the trust assets immune from the claim of the trustee in bankruptcy.[9]

The federal Bankruptcy Act, granting priority to debts owed to the federal government for taxes, demands uniformity of application among the states in a degree equal to § 3670. This requirement is satisfied in both cases by reliance upon the state law of property, once the court is satisfied that the state law is established without reference to the federal law, and is of general application to all transactions within the state. The fact that the state sees fit to protect certain classes of interests is binding upon the federal government to the extent that the state creates property interests in the preferred class, since these property interests govern in the absence of a controlling federal statute to the contrary. In the instant case, there is no federal statute defining "property rights." Should this court, in the absence of statutory direction to the contrary, choose to ignore the contractor's lack of a property interest in the trust res, and permit the federal lien to attach, a series of anomalous results could occur which would serve to frustrate both federal policy as set forth in §§ 3670-72, and state policy as set forth in the Lien Law—a result which could hardly be less satisfactory. If such were the law, and a $10,000 obligation were owing from an owner for the improvement of real property, under New York Law it would be immune from claims of judgment-creditors of the contractor until all subcontractors, mechanics and materialmen had been paid. Should, in addition, a judgment be outstanding against the contractor in the sum of $10,000, and should it exist prior to the filing of a federal tax lien against the "property" or "rights to property" of the contractor, under § 3672 it

[9] *In re Treister & Son, Inc.*, 145 F. Supp. 144, 146 (S.D.N.Y.); *In re Heintzelman Construction Co.*, 34 F. Supp. 109 (W.D.N.Y.); *Albert Pick Co., Inc.* v. *Travis*, 6 F. Supp. 486 (E.D.N.Y.).

would take precedence over a tax lien. A situation would exist which has been termed "circular priority"[10] whereby the federal lien has priority over the beneficiary of the trust, who, in turn, has priority over the judgment creditor. The circle is complete since the judgment creditor has priority over the federal lien. In a suit by the government to enforce its lien, the government is precluded from recovering by existence of the judgment creditor, who in turn cannot recover since under state law he has no interest in the fund. The ultimate recipient would be the beneficiary under the trust, whom, it has been established, is in a position inferior to the government. Many other combinations can be anticipated, all of which have comparably bizarre results. These results go to confirm the thesis that the application of the federal lien *must* be determined by reference to state property rights, which must govern the result in the case at bar.

The New York Court of Appeals in the instant case relied upon *United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232. On its facts, *Kings County* is admittedly indistinguishable from the case at bar. Although the Second Circuit there recognized the bases for prevailing over the federal lien, namely (1) by establishing that the fund in question was not the property of the taxpayer, or (2) bringing the claim within the classes protected by § 3672, or (3) perfecting the interest to the extent required to prevail under the theory that the "first in time is first in right", it did not feel that the subcontractor came within the protection of either of said three situations. However, the Second Circuit itself recognized, in its later decision in *Fidelity & Deposit Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d 142, and cited with approval by this court in *United States* v. *Bess, supra*, that "The Court [in *Kings County*] did not inquire whether the state had created a right [in the defaulting taxpayer]. It assumed

[10] Final Report of the Committee on Federal Liens, ABA, presented to House of Delegates February 23, 1959, p. 28.

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hat it did . . ." (241 F. 2d at 145). Thus, by the Second Circuit's own opinion, *Kings County* is not authority for he proposition for which it was cited by the New York ourt where that court states "It was asserted against the ontractual obligation of Bottone to Fleetwood, against Bottone's indebtedness to the latter, and, quite obviously, ithin the statutory terms personal 'property or rights to such] property' belonging to the taxpayer." The New ork court similarly erred in that it did not inquire into hether a property right actually existed in favor of Fleet-ood—it failed to recognize that the indebtedness itself ue from Bottone to Fleetwood constituted the res and orpus of the statutory trust. In neither case did the court nvestigate whether the property belonged to the taxpayer *ut assumed that it did*, the court in *Kings County* stating: But it seems extremely doubtful to us that any trust fund evice could ever supersede federal tax liens, even if the tate purported to omit all perfecting requirements." It s submitted that this is precisely the reasoning, as echoed y the New York Court of Appeals, which this court ruled rroneous in *Bess* by recognizing the necessity to look o state concepts of property when applying to federal en statutes.

The Second Circuit in *Fidelity & Deposit* dealt with a ituation which, although distinguishable on its facts from he instant case, is virtually indistinguishable in theory. n that case, upon default by the contractor, the surety n a bond guaranteeing the performance by the contractor n a public improvement came in and completed the job. contest ultimately arose between the surety and the ederal government, the latter claiming a lien against the roceeds of the contract for taxes owing by the contractor. he court there upheld the surety and decided that the nds were not the property of the taxpayer within the rview of § 3670. In the course of its decision, the court ealt with *Kings County*, and limited the holding of the tter case to the proposition that the state classification f the "reserve fund as a 'trust' [did not] preclude a

federal inquiry into the nature of the right thus created (241 F. 2d at 145). The decision in *Kings County*, as limited, is in accord with the decisions of this court.

The factual distinction in *Fidelity & Deposit* is the clause in the prime contract making the contractor's right to receive payment under the contract contingent upon the prior payment of all subcontractors and materialmen. This, the court felt, effectively deprived the contractor of any "right to property" until the condition precedent was performed. It is significant that the government did not seek review of this decision. The holding has since been followed by the New York Court of Appeals in *Aetna Cas. & Sur. Co.* v. *United States*, 4 N. Y. 2d 639, just as *Kings County* was followed in the case at bar.

The continued existence of these two decisions will lead to but one conclusion—private individuals are able to do by contract that which the state is unable to accomplish by statute. A well-informed owner or subcontractor need only insist upon the inclusion of a "*Fidelity & Deposit* clause" in his contract and any claim of the government for taxes owed by the contractor will be effectively defeated. However, this is not the individual whom the state primarily seeks to protect. The state seeks to protect the uninformed mechanic who cannot obtain legal counsel perspicacious enough to insert a "*Fidelity & Deposit* clause," or the poor one whose bargaining power is not sufficient to compel its insertion. The present state of the law operates also to hamper the small contractor whose resources do not permit the payment of subcontractors from his own funds, but who cannot obtain the most profitable contracts unless he is prepared to do so, since the owner will be sure to require the protective clause. We are therefore met with the anomalous situation where private individuals with adequate resources may protect themselves, while the state is unable by statute to protect the common carpenter or plumber whose bargaining position cannot command protection, and who is less prepared to sustain a loss.

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In the instant case, the government contends that its lien came into existence, in accordance with § 3670, from the time the assessment lists were received by the District Collector of Internal Revenue, and immediately attached to any property of the taxpayer thereafter acquired. Here, the lien purportedly arose prior to the time the premises were purchased by the owner, prior to the time the prime contract was signed, and prior to the time the subcontractors and materialmen performed their respective services. If that is so, the petitioners herein at no time had any prospect of being paid for their efforts, although they had no way to ascertain this fact. The assessment procedure is wholly internal within Internal Revenue Service, and is not a matter of public record. At all times the only product of their labors would be the payment of another party's indebtedness to the government. All this stems from the fact that the prime contract herein did not contain a clause affirming that which was already true as a matter of state law, that the contractor could receive no benefit until the beneficiaries of the trust were paid. The sole purpose of the safeguards afforded the mechanic under state law—the assurance that he alone will receive the fruits of his labors, is subverted by the decision in the instant case.

Two facets of the trust provisions are frequently resorted to when one seeks to establish that the mechanic or materialman holds merely an inchoate lien. First, it is claimed that, since the amounts due to the beneficiaries are not identified and may not consume to entire corpus of the trust, the property interest remains in the contractor. Secondly, the fact that an action to enforce the trust must be commenced within one year from the completion of the improvement is taken as evidence that further action is required of the beneficiary before his interest is perfected. The application of fundamental concepts of trust law indicates that reliance upon these provisions to deny the existence of a valid trust is misplaced.

It is fundamental that a trust may be created in favor of a class. The trust is valid, even though the trustee or another person has authority "to determine which member or members of the class shall take and in what proportions they shall take." Scott on Trusts, 1956 Ed., Vol. II, § 120. In such a case, no member of the class is assured that he will receive a benefit from it, since the entire assets may be allocated to another beneficiary, but he nevertheless may bring a representative action to enjoin or redress a breach of trust (*Ibid.*). Should the trust be of limited duration, and should the trust assets not be distributed within the specified period, in the absence of other provisions a resulting trust arises in favor of the settlor. "A resulting trust arises where property is transferred upon a trust and it does not appear from the trust instrument whether the accomplishment of the purposes of the trust will exhaust the entire estate, *but it ultimately turns out* that the whole of the trust estate is not needed for the accomplishment of the purposes." Scott on Trusts, 1956 Ed., Vol. IV, § 430.2. (Emphasis supplied.)

Applying these fundamentals to the case at bar, § 36-a establishes a trust for the benefit of mechanics, materialmen, etc.—a specific class. The trust assets are identified, and the trust is to endure until one year after completion of the improvement. Initially, it is impossible to determine if the trust assets will all be needed to meet the claims of the beneficiaries. Nevertheless, until they are all satisfied, the trustee holds bare legal title. After all the beneficiaries are satisfied in accordance with the terms of the trust, if a surplus exists, a resulting trust will arise in favor of the contractor and a beneficial interest rests in him. Not until that occurrence—the payment of all beneficiaries—does the contractor obtain any beneficial interest in the surplus of the funds over the claims of the beneficiaries.

The statutory trust established by New York law is clearly in consonance with the basic principles of trust

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law applicable to express trusts. Those basic principles further establish that all "property rights" to the funds in question are vested in the beneficiaries during the duration of the trust, not the trustee. Any contingent, residual rights which may come into existence upon the termination of the trust have no effect upon the "property rights" to the funds in question during the duration of the trust.

The trust assets having been proven insufficient to satisfy the rights of the trust beneficiaries, no resulting trust could arise in favor of the contractor. In this case, it is difficult to conceive how "rights to property" in favor of the contractor can be unearthed, absent the necessary interest created by state law. Only non-recognition of the interests created by state law can result in a decision in favor of the government.

The cases relied on by the government and the court below all dealt with competing claims to property which was *admittedly* that of the taxpayer. In such instances, the question of whether the competing claimant's interest is sufficiently perfected to prevail is properly before the court. Here we question that which was assumed in those cases—the taxpayer's right to the property. Consequently, a different approach is necessary. The claimant need not establish that the property is his or that his interest is perfected in order to prevail over the government. He must, rather, establish that the property is *not* that of the taxpayer. Therefore, even should this court determine that the interest of petitioner is not perfected, which petitioner denies, decision should nevertheless be rendered in his favor on the ground that under New York Law, the taxpayer has no beneficial interest in the funds, and the government, claiming through him, is not entitled to the fund in question.

The 1959 revision of the trust fund provisions[11] "*re-state*[*d*] the present provisions defining trust funds and

[11] L. 1959, C. 696.

trust purposes, specifie[d] an additional category of trust funds, and recognize[d] certain necessary payments as being within the trust purposes"[12] (emphasis supplied). For present purposes, we are not concerned with the impact of any additions or extensions, save insofar as they indicate a continuing legislative purpose to afford maximum protection to the statutory beneficiaries, and to ensure that funds arising by virtue of an improvement go to pay the expenses thereof. Nor are we concerned with changes governing the administration of the trust, except to note that they go to further safeguard against misapplication of trust assets. However, the restatement of certain provisions of former § 36-a in § 70 of the revised statute, along with the specific recognition in the revised statute of the applicability of fundamental trust principles, confirms the intent of the legislature and the courts, insofar as prior judicial decisions are recognized by statute, to vest the "property rights" to the funds in question in the beneficiaries until the termination of the trust. The statute now specifically provides: "Upon termination of the trust by payment or discharge of all the trust claims, the beneficial interest in any remaining assets shall vest in the owner, contractor or subcontractor, as the case may be" (§ 70(3)). As heretofore demonstrated (pp. 21-23), this same result is reached by the application of basic trust principles. Section 70(3) does not change the law—it merely embodies in the statute those long standing principles of trust law which govern the disposition of the case at bar.

If the taxpayer in the instant case were the owner of the real property improved, and his own assets were the only source of payment, prior decisions of this court would indicate that the federal tax lien would be entitled to

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[12] *Trust Fund Provisions of the Lien Law*, 1959 Leg. Doc. No. 65(F).

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priority.[13] In such a case there would be no trust funds in existence, and the only recourse open to the mechanic or materialman would be through the enforcement of his lien on the real property. In that case, we would be required to ascertain the relative priority of the competing liens. In the instant case, any priority afforded the federal lien, by statute or otherwise, is not relevant since the basic element essential to the existence of the federal lien—a "right to property" in the taxpayer, is missing.

**B. The Mechanic's Lien:**

If the federal tax lien and the mechanic's lien under state law attach to the identical property, a contest arises wherein the order of precedence must be established. However, in the case at bar, the two liens do not encumber the same property. The federal lien attaches to all "property" or "rights to property" of the taxpayer; the mechanic's lien is impressed upon the real property improved. These may be identical where the taxpayer and the owner are the same individual, but where, as here, the taxpayer is a contractor who does not own the real property improved, the liens attach to separate items of property and it is not necessary to establish an order of precedence. Petitioner does not at this time contest the validity or priority of the federal lien upon all the "property" or "rights to property" of the taxpayer.[14] Petitioner contends that the fund in question is not such a property right of the taxpayer.

The fund in question was deposited in court by Bottone, owner of the real property improved and against which the subcontractor filed its lien and said monies were in substitution of the real property. The government had no lien against the *real property*—which was *not*, at any time, the

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[13] *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; *United States* v. *Vorreiter*, 355 U. S. 15, et al. Petitioner questions the propriety of these decisions (see *post*, pp. 27-29), but in the consideration of the "trust fund" doctrine they are not relevant.

[14] See *post*, pp. 27-34.

property of the contractor-taxpayer, nor did it have, or could it have had, a lien against the fund deposited in substitution of the real property. The Appellate Division below, recognized this stating "The funds deposited by Bottone were in this case substituted for her property . . ." (R. p. 64).[15] Since the federal lien clearly did not attach to any real property belonging to Bottone, our inquiry must be directed to the relative interests of the contractor and the subcontractor to the real property. The government's lien, although perfected, does not vary or enlarge the interest of the taxpayer to which it attaches, and if, under New York Law, the subcontractor's rights are superior to those of the contractor-taxpayer, he must prevail over the federal lien.

In addition to the contractor's right to sue on the contract in his capacity as trustee, he has a lien upon the real property improved. This lien may be perfected by filing, and may be foreclosed and satisfied by the sale of the real property. An identical right exists in favor of the subcontractor. The relationship between these rights is set forth in § 56 of the Lien Law. Pursuant to that section, the subcontractor is entitled to priority of payment regardless of whether he shall have filed his lien.[16] Therefore, the right of the contractor was always subject and subordinate to the interest of the subcontractor, and even though the federal lien attached to the contractor's right, under the principles recognized in the *Bess* case that contractor's right cannot be elevated over the interest of the subcontractor. The government, having no lien against the *real property* involved, has no lien against the funds deposited in substitution therefor. Under these circumstances, the government can be in no better position than Fleetwood,

[15] § 55, New York Lien Law.

[16] § 56 does not specify that the subcontractor must have filed a lien. It merely states that he shall be paid "before any part of said proceeds is paid to the person for whom he has performed such labor or furnished such materials."

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the contractor would have been if its interest was not subject to the federal lien, and is entitled only to what surplus exists after the mechanic's lienors have been paid—in this case, nothing. Thus, whether the fund be viewed as the proceeds of the contract between Bottone and Fleetwood, or as a deposit in place of Bottone's real property, the petitioner's herein are entitled to receive it to the exclusion of the government.

**C. Lien Priority:**

§ 3670, in establishing a lien in favor of the government for unpaid taxes, makes no reference to any order of priority to be accorded said lien. §§ 3671 and 3672 merely specify the duration of the lien, and specify certain classes who are protected from the impact of the lien unless the federal lien is first recorded in the place designated by law. The only conclusion fairly inferable from a reading of these sections in conjunction with each other is that the government is to possess a fully perfected lien, against the *property of the contractor-taxpayer,* effective against all except those specified in § 3672, without filing.

The next question to be met, should this court disagree with petitioner's contention that no "property" or "right to property" exists herein for the federal lien to attach to, is the effect to be given this fully perfected lien held by the government, and what law is to determine its effect.

This court has held in *United States* v. *Security Tr. & Sav. Bk.,* 340 U. S. 47, that the federal lien is to be accorded priority over any other lien which is not fully perfected as of the date that the federal lien attached. In that case it was argued by the government that § 3670 was, essentially, *in pari materia* with R. S. § 3466, 31 U.S.C.A. § 191, and this proposition, *unopposed by the respondent who failed to file a brief or argue and submitted on the record,* was apparently accepted by the court. The two sections should not have been equated to each other. R.S.

§ 3466 specifically established a priority of *payment* upon the insolvency of a taxpayer in favor of the government. Stringent provisions were necessary to protect the rights of the government in a situation wherein it was apparent that the assets of the taxpayer would not be sufficient to pay all of his debts, and as a result, a stringent statute was enacted by Congress. The Court in *Security Trust* read these provisions into a statute, namely § 3670, enacted to cope with a problem which presents no such urgent fact situation. At the time the federal lien under § 3670 attaches, there is no clear indication that the taxpayer will be unable to pay his debts. If such situation should arise, the government still has recourse, either under § 3466 or through the priority provisions incorporated in the Bankruptcy Act. There is no necessity to accord the federal lien such preferential treatment at this time, nor is there any indication that the Congress intended it to be so. In Mr. Justice Jackson's concurring opinion in *Security Trust*, he quotes the House Report accompanying the 1913 amendment which added in essence the provisions contained in § 3672 (37 Stat. 1016, Ch. 166).[17] That report referred to the scope accorded § 3670 with great trepidation, and made reference to its impact to support the necessity for ameliorating legislation. However, that report, as quoted by Mr. Justice Jackson, made reference only to the scope of the property rights to which the federal lien attached, not to the effect of that lien once it was in existence. § 3672 required that the lien be recorded in order to protect certain classes who were in effect transferees of the taxpayer's interest, and prevent them from giving value for the transfer of an interest which was secretly encumbered. § 3672 alleviated problems arising from the lien's secrecy, and did not relate to any priority to be afforded to it. The classes specified therein did not have to contend with the federal lien. The section did not purport to establish a priority in favor of the federal lien over

[17] H. R. Report No. 1018, 62nd Cong. 2d Sess. 1912.

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all other liens in existence at the time it arose. In fact, the House Report also stated "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."[18] This is a clear indication that the court erred in equating § 3670 with § 3466 to establish a priority in favor of the government.

In the application of the federal lien, it has already been established that in determining the property of the taxpayer to which it attaches, reference must be made to the state law of property. Likewise, when determining the impact of a federal lien, there is an interplay between federal and state law. The federal law lien statutes do not purport to enact a complete system, but are superimposed upon, and only partially override, the state property law. Absent a manifestation of congressional intent to override the state property law, the latter must prevail. "Since Congress has not manifested a desire for uniformity of liability, we think that the creation of a Federal decisional law would be inappropriate in these cases. In diversity cases, the Federal Courts must now apply State decisional law in defining State-created rights, obligations and liabilities. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64." *Commissioner* v. *Stern,* 357 U. S. 39, 45. Neither in the statute establishing the federal lien nor in the accompanying legislative reports does one find evidence of such intention to create uniformity of liability. As a result, once, as the government contends herein, a federal lien for taxes arises, it is still necessary to direct our attention to the effect to be given this lien under the state law of property.

The federal lien was not meant to ensure that the government receive the proceeds of the property to the exclusion of all others. As demonstrated previously, the factual situation existing at its inception does not warrant such stringent measures. In the case at bar, the federal

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[18] H. R. Report No. 1018, 62nd Cong. 2d Sess. 1912.

lien purportedly arose over two years before the fund in question arose, but the taxpayer was still in business and operating. The lien was rather intended to fulfill the purpose which likewise justifies the existence of liens in favor of private individuals; to wit, preventing the taxpayer from divesting himself of his assets so that he will not be able to pay his indebtedness. The government is already preferred in that in most instances its lien need not be filed—no further preference is required to protect the government's interest. The existence of the federal lien preserves the status quo, and gives the government time in which to proceed with the enforcement of its claim. This is all which Congress intended, and places the government on par with all other lienors without the necessity of filing. At a later date, should the taxpayer become insolvent or bankrupt, the statutes governing those situations grant the necessary priorities to afford the government what Congress felt were adequate safeguards for the collection of its taxes. It ensures payment from the assets belonging to the taxpayer, rather than requiring third parties in effect to pay the debt due to the government.

A number of cases have been decided by this court in reliance upon the authority of *Security Trust*. Few of them are in point in the case at bar. *United States* v. *Gilbert Associates*, 345 U. S. 361, involved the federal tax lien in contest with a town tax lien. The court decided that the town was not a purchaser under § 3672, which does not concern us here. The taxpayer there was insolvent, and the government was accorded priority under R. S. § 3466. As a result, although a lien contest was involved, the facts were so dissimilar from the instant case that different statutes and principles of law governed.

In *United States* v. *City of New Britain*, 347 U. S. 81, this court recognized the distinction set forth above; that "the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority

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of the United States." 347 U. S. at 84. It was further aware that the United States has priority in insolvency when all the property of the debtor is involved. The court decided that the United States was entitled to prevail, not by virtue of any intrinsic priority, but on the ground that "the first in time is the first in right." (347 U. S. at 35.) It was in this respect that the court erred. It supports this ruling by stating "There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression." (347 U. S. at 88.) The court did not recognize that § 3672 did not directly concern the priority of liens, but rather specified situations in which the liens would not attach. The legislative history, as has been pointed out (p. 29) goes to defeat the court's thesis rather than support it. The court, in awarding the federal lien priority over any lien subsequently arising, chose to override state law in the absence of any federal statute to the contrary. The legislative purpose, to prevent the taxpayer from divesting himself of his property, does not require this preferential treatment—the lien of a judgment-creditor, which exists for the identical purpose, is all which the exigencies of the situation demand.

The court in *United States* v. *Acri*, 348 U. S. 211, *United States* v. *Liverpool & L. & G. Ins. Co.*, 348 U. S. 215, and *United States* v. *Scovil*, 348 U. S. 218, relied upon the reasoning set forth above. Inquiry was made to discover whether the opposing lien was "choate" or "inchoate" at the time the federal lien arose on the theory that only a fully perfected, "choate" lien existing when the federal lien arose would prevail over the federal lien. *United States* v. *Colotta*, 350 U. S. 808, *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010; *United States* v. *Vorreiter*, 355 U. S. 15, were *per curiam* decisions apparently decided on the same basis. This doctrine has carried to the

point where only a lien which needs nothing further toward its liquidation and enforcement will be considered "choate," unless it is one specifically mentioned in § 3672. Apart from those liens covered by § 3672, for a private individual, such a lien *can not* exist. It is the nature of the lien that it merely preserves the status quo with a view to eventual enforcement of the underlying claim. It represents security for the payment of an outstanding debt.[19] As such, the recent cases in this court prevent it from becoming sufficiently perfected to prevail over the federal tax lien, unless it is a lien created by another sovereign body which accords its lien similar preference. And then, the courts state that no rule of preference enacted by the state can defeat the federal lien.[20] There is a tenuous semantic difference between stating that the federal lien is entitled to priority, or saying that "the first in time is the first in right," and then deciding that only the government can come first. No such result was intended by Congress, and the criterion of "perfection" or "inchoateness" should not be applied in this case.

Consistent with the legislative purposes, it is more appropriate to accord the government the lien of a judgment-creditor under state law. This serves to preserve the status quo, and prevents the taxpayer from divesting himself of the specific property to which the lien has attached. Should further recourse be required by the government if it ultimately develops that the taxpayer cannot meet his obligations, R. S. § 3466 and the Bankruptcy Act provide additional safeguards by way of preferential treatment. It is your petitioner's contention that this is all that is required by the terms of § 3670, and by the underlying legislative purpose embodied therein.

As has been established previously (pp. 13-14), the mechanic's lienor under New York Law is entitled to prevail

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[19] Black's Law Dictionary, 3rd Ed.

[20] *United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232.

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over the liens of judgment-creditors regardless of when those liens arose.[21]

The purposes of the protection afforded subcontractors and materialmen under New York law are clear. It is intended that all monies earned and accruing by reason of their work, labor and materials shall be, at all times, available for payment of their claims before any of such monies are available to the contractor [taxpayer], directly or indirectly.

In the present state of the law, as embodied by the decision of the court below, only the well-advised subcontractor who inserts a "*Fidelity and Deposit* clause" may prevail over the federal lien. This puts the burden of the federal lien on the less affluent subcontractor or materialman who cannot bear it, and benefits the government little, since where large funds are involved it may be anticipated that astute counsel will be retained who will put the fund beyond the reach of the government merely by inclusion of such a "*Fidelity and Deposit* clause."

The application of the decision in the court below also will operate to hinder the government in the long run, since it will make it more difficult for a contractor who is temporarily pressed for funds to obtain new work, the profits from which would go to pay his taxes. The contractor in default in the payment of his taxes will find it difficult to find subcontractors and materialmen who will extend credit to him, and render it well-nigh impossible for him to obtain a bond when required since the surety will know he is faced with the possibility of being subordinated to a secret federal lien. As a result, the contractor may be strangled financially, with no concomitant gain to the government.

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[21] *Waldman* v. *D & V Plumbing & Heating Contractors, Inc.*, *supra*; *Corbin-Kellog Agency, Inc.* v. *Tasker*, *supra*.

A reversal of the judgment below will be in consonance with governing law as expressed in both this court and in the courts of the State of New York, and will also add a certainty of result to commercial transactions between contractors and subcontractors and materialmen which is clearly in the public interest.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgment of the New York Court of Appeals below should be reversed and that judgment herein should be rendered in favor of the petitioners; or, that the cause should be remanded to the New York Court of Appeals for consideration and determination of the contractor's interest in the fund in question, if any, under the established and applicable doctrines of the New York law of property; and, if such interest be found, for determination of whether such interest constitutes "property" or "rights to property" within the meaning of § 3670, 11 U.S.C. 3670.**

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## APPENDIX

**(a) The Federal Lien for Taxes.**

Section 3670 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3670, 53 Stat. 448, now appearing as Section 6321 of the Internal Revenue Code of 1954, 26 U.S.C. (1952 ed., Supp. II) 6321, 68A Stat. 779, provides as follows:

LIEN FOR TAXES

> If any person liable to pay any tax neglects or refuses to pay the same after demands, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 3671 of the Interial Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3671, 53 Stat. 449, now appearing as Section 6322, 26 U.S.C. (1952 ed., Supp. II) 6322, 68A Stat. 779, provides as follows:

PERIOD OF LIEN

> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Section 3672 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3672, 53 Stat. 450, now appearing as Section 6323, 26 U.S.C. (1952 ed., Supp. II) 6323, 68A Stat. 779, provides as follows:

VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) INVALIDITY OF LIEN WITHOUT NOTICE.—

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) UNDER STATE OR TERRITORIAL LAWS.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) WITH CLERK OF DISTRICT COURT.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) WITH CLERK OF DISTRICT COURT FOR DISTRICT OF COLUMBIA.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) FORM OF NOTICE.—

If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form of content of a notice of lien.

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(c) EXCEPTION IN CASE OF SECURITIES.—

(1) EXCEPTION.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) DEFINITION OF SECURITY.—As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) DISCLOSURE OF AMOUNT OF OUTSTANDING LIEN.—

If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

**(b) The New York State Lien Law.**

New York Lien Law, Section 36-a, L. 1942, c. 808, Sec
tion 4, provided as follows:

> The funds received by a contractor from an owne
> for the improvement of real property are hereby de
> clared to constitute trust funds in the hands of suc
> contractor to be applied first to the payment of claim
> of subcontractors, architects, engineers, surveyor
> laborers and materialmen arising out of the improve
> ment, and to the payment of premiums on surety bon
> or bonds filed and premiums on insurance accruin
> during the making of the improvement and any con
> tractor and any officer, director or agent of any con
> tractor who applies or consents to the application o
> such funds for any other purpose and fails to pay th
> claims hereinbefore mentioned is guilty of larceny an
> punishable as provided in section thirteen hundred an
> two of the penal law. Such trust may be enforced b
> civil action maintained as provided in article three-a o
> this chapter by any person entitled to share in th
> fund, whether or not he shall have filed, or had th
> right to file a notice of lien or shall have recovered
> judgment for a claim arising out of the improvemen
> For the purpose of a civil action only, the trust fund
> shall include the right of action upon an obligation fo
> moneys due or to become due to a contractor, as we
> as moneys actually received by him.

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Summary of argument | 6 |
| Argument: | |
| Federal tax liens on funds due a contractor are superior to the claims of subcontractors asserted under New York law where the subcontractors had not filed notices of their liens until after the federal tax liens came into existence | 9 |
| A. The indebtedness of the owner to the taxpayer constituted property of the latter (to which the federal tax liens attached), notwithstanding that New York treats such indebtedness as a "trust fund" for the benefit of subcontractors and materialmen | 11 |
| B. The fund deposited by the owner in court constituted property of the taxpayer to which the federal tax lien attached | 22 |
| C. There is no occasion here for re-examination of the settled rule that federal liens have priority over previously filed state-created mechanic's liens which require further steps for their perfection | 23 |
| Conclusion | 25 |
| Appendix | 26 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Arkansas* v. *Texas*, 346 U.S. 368 | 13 |
| *Corbin-Kellogg Agency* v. *Tasker*, 248 App. Div. 58 | 18 |
| *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F. 2d 142 | 14, 21 |

Cases—Continued Page

*General Trading Co.* v. *Tax Commission*, 322 U.S. 335 13
*Gramatan-Sullivan, Inc.* v. *Koslow*, 240 F. 2d 523, certiorari denied, 353 U.S. 958 15, 17
*Herrmann & Grace* v. *Hillman*, 203 N.Y. 435 19
*Musser* v. *Utah*, 333 U.S. 95 7, 13
*Raymond Concrete Pile Co.* v. *Federation Bank*, 288 N.Y. 452 15, 16, 18
*Saltser & Weinsier, Inc.* v. *Monroe Plumbing & Heating Supply Corp.*, 290 N.Y. 903 15, 17
*Speiser* v. *Randall*, 357 U.S. 513 13
*United States* v. *Acri*, 348 U.S. 211 9
*United States* v. *Bess*, 357 U.S. 51 13, 20
*United States* v. *Colotta*, 350 U.S. 808, reversing 224 Miss. 33 9
*United States* v. *Durham Lumber Co.*, 257 F. 2d 570, pending on certiorari, No. 23, this Term 20, 23
*United States* v. *Hulley*, 358 U.S. 66, reversing 102 So. 2d 599 9
*United States* v. *Kings County Iron Wor[illegible]* 224 F. 2d 232 14, 20, 21
*United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215 9
*United States* v. *New Britain*, 347 U.S. 81 9, 11, 24
*United States* v. *Scovil*, 348 U.S. 218 9
*United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47 9
*United States* v. *Vorreiter*, 355 U.S. 15, reversing 134 Col. 543 9
*United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing 227 F. 2d 359 9
*Van Clief* v. *Van Vechten*, 130 N.Y. 571 19
*Washington Square Slum Clearance, In re*, 5 N.Y. 2d 300, pending on petition for a writ of certiorari *sub nom. United States* v. *Coblentz*, No. 259, this Term 14
*Wickes Boiler Co.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415, certiorari denied, 314 U.S. 686 19

Statutes:

Internal Revenue Code of 1939:
Sec. 3670 (26 U.S.C. 1952 ed., Sec. 3670) 2, 5, 6, 11, 13, 14, 26
Sec. 3671 (26 U.S.C. 1952 ed., Sec. 3671) 2, 6, 11, 26
Sec. 3672 (26 U.S.C. 1952 ed., Sec. 3672) 2, 12, 26

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Statutes—Continued

New York Lien Law, 32 McKinney's Consolidated Laws of New York:

| | Page |
|---|---|
| Sec. 3 | 2, 27 |
| Sec. 4(1) | 2, 27 |
| Sec. 13 | 18 |
| Sec. 13(7) | 2, 28 |
| Sec. 25-a | 15, 16 |
| Sec. 36-a | 2, 29 |

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# n the Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

ROBERT AQUILINO, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*VRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

ıe opinion of the New York Court of Appeals 65–70) is reported at 3 N.Y. 2d 511. The opinion he Appellate Division of the Supreme Court of York (R. 62–64) is reported at 2 App. Div. 2d The opinion of the Supreme Court, Westchester ıty (R. 52–53), is reported at 140 N.Y.S. 2d 355.

### JURISDICTION

e judgment of the Court of Appeals was entered ecember 5, 1957. (R. 70–72.) An order denying tion for reargument but amending the remittitur entered on April 15, 1958. (R. 72–73.) The on for a writ of certiorari was filed on June 27, and was granted on February 24, 1959. (R. 82.)

The jurisdiction of this Court rests on 28 U.S.C 1257(3).

## QUESTION PRESENTED

Whether the New York Court of Appeals correctl held that under New York law the indebtedness of a owner of realty to a building contractor constitute "property" of the latter to which federal tax lien attach.

## STATUTES INVOLVED

Sections 3670, 3671, and 3672(a) of the Interna Revenue Code of 1939 and Sections 3, 4(1), 13(7) an 36-a of the New York Lien Law are set forth in th Appendix, *infra*, pp. 26–30.

## STATEMENT

This case arises out of actions instituted by tw subcontractors, petitioners here, to enforce mechanic liens against a fund due to the contractor for whom they furnished labor or materials at a time when there were outstanding federal tax liens against such con tractor for unpaid withholding taxes.[1] While non of the courts below entered findings of fact, the fact are undisputed and may be briefly summarized a follows:

The taxpayer, Fleetwood Paving Corporatio ("Fleetwood"), was a general contractor who was i default in the payment of federal withholding taxe (R. 65.) On December 27, 1951, the Collector of In ternal Revenue received an assessment against suc taxpayer for unpaid withholding taxes plus interes

[1] The actions were consolidated for hearing in the cour below. (R. 42.)

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in the amount of $4,464.70, and on March 21, 1952, the Collector received a further assessment in the amount of $3,168.11. (R. 46, 49.) On October 31, 1952, the Collector filed notice of the federal tax liens in the office of the city clerk of the City of Mount Vernon, New York, where taxpayer had its place of business. The total amount of such liens was $5,632.81, consisting of $355.30 of the first assessment remaining unpaid as well as the entire amount of the second assessment, together with unassessed interest and penalties. (R. 47, 49, 51.)

In July or August, 1952, the taxpayer contracted with Ada C. Bottone to remodel a restaurant which she had purchased earlier that month. (R. 43, 65.) On August 25, 1952, petitioners Aquilino and Spero entered into a contract with Fleetwood to furnish certain labor and materials for use in such work. Aquilino and Spero performed their subcontract, but received payment of only $1,000 out of the full subcontract price of $2,400, leaving a balance due them of $1,400. (R. 10–11, 65, 66.) Similarly, between October 2, 1952, and October 8, 1952, petitioner Colonial Sand and Stone Company, Inc. ("Colonial"), furnished certain materials to Fleetwood for an agreed price of $896.25, no part of which has been paid. (R. 40.)

On November 3, 1952 (after the federal liens had been filed), petitioners Aquilino and Spero filed a notice of their mechanic's lien for $1,400 in the office of the county clerk of Westchester County, where the real estate was located (R. 11, 66). On November 10, 1952, petitioner Colonial filed its lien (for

$896.25) in the same office (R. 40, 66). Copies of such notices of lien were served upon the owner and Fleetwood by Aquilino and Spero on November 6, 1952 (R. 12), and by Colonial on November 12, 1952 (R. 41).

In June 1953, separate actions to foreclose their liens were instituted in the New York Supreme Court by petitioner Colonial, and by petitioners Aquilino and Spero (R. 15–20, 22–27, 41). The owner filed an answer admitting that $2,200 remained due and unpaid under her contract with Fleetwood (R. 28–29), and by order entered July 28, 1954, she was permitted to deposit this sum with the clerk of Westchester County and was thereupon discharged from further liability to the petitioners, and the United States was ordered substituted as a defendant in both actions. (R. 32–33.)

The United States served answers in both actions alleging that its tax liens had priority over the mechanic's liens (R. 33–38). Petitioners then moved for summary judgment foreclosing their mechanic's liens, and the United States cross-moved for summary judgment (R. 8–9, 38–39, 45–51). The court granted petitioners' motions and denied that of the United States. It held (R. 52–53) that the lien of the United States was not effective because it should have been filed in the office of the county clerk as a lien against real property rather than in the office of the city clerk of Mount Vernon as a lien against personal property; and that petitioners were entitled to priority as statutory assignees of a

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taxpayer whose claims were prior to those of the United States.

The Appellate Division affirmed on another ground. It ruled that when the federal liens arose no debt was owing from the owner to the contractor; that when such debt came into existence it was already encumbered by petitioners' mechanic's liens; and that the United States stood in the same position as the contractor, namely, it had a claim only after petitioners had been paid. (R. 62–64.)

The New York Court of Appeals (*per* Judge Fuld, Judge Van Voorhis dissenting without opinion) reversed. It pointed out that the federal tax liens were not asserted against real property of either the owner or the taxpayer, but against the owner's "contractual obligation" to the taxpayer (R. 68); that such indebtedness was "quite obviously" "personal 'property and rights to [such] property' belonging to the taxpayer" within the meaning of Section 3670 of the Internal Revenue Code of 1939 (R. 68); and that since the federal liens had been filed before petitioners filed their mechanic's liens, the federal liens were "entitled to priority" under the "firmly established" rule that "once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it" (R. 67). The court further held (R. 68–69) that since "no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land," the provision of the state's lien law upon which petitioners relied—"that funds received by a

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contractor from the owner for the improvement of real estate shall be deemed 'trust funds' for the payment of subcontractors"—"may not be construed to affect the rights of the government or the priority of its tax lien."

Petitioners sought reargument, on the ground that the court had "overlooked their fundamental argument" (R. 76) that "no interest in the property involved existed under the law of the State of New York in favor of the defendant Fleetwood Paving Corporation, and that therefore there is no 'property or right to (such) property' to which a Federal tax lien can attach under United States Code, Title 26, Sec. 3670" (R. 77). The court denied reargument (R. 72–73).

## SUMMARY OF ARGUMENT

A. Section 3670 of the Internal Revenue Code of 1939 provides that a lien for federal taxes shall attach to "all property and rights to property" of the taxpayer, and Section 3671 provides that the federal lien shall arise at the time the assessment list is received by the Collector. The assessment lists giving rise to the federal liens here involved were received on December 27, 1951, and March 21, 1952, and were recorded on October 31, 1952, whereas the petitioners did not perform labor or furnish materials before August, 1952, and did not file notices of their mechanic's liens until November, 1952.

It is well settled that federal tax liens have priority over subsequently filed mechanic's liens. Applying this principle, the New York Court of Appeals ruled

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hat whether the federal lien had priority, therefore, depends solely on whether the indebtedness due to the taxpayer] from [the owner] constituted property of [the taxpayer]" (R. 68). The court held (*ibid*) that, even though the New York Lien Law created the indebtedness from an owner to a contractor as a "trust fund" for the benefit of subcontractors and materialmen, such indebtedness was "quite obviously * * * personal 'property and rights to [such] property' belonging to the taxpayer." "What the statutes of a State mean, the extent to which any provision may be limited by other acts * * * are questions on which the highest court of the State has the final word." *Musser* v. *Utah*, 333 U.S. 95, 98.

Petitioners, although recognizing that whether the owner's indebtedness to the contractor was property or the latter is a question of state law, contend that in deciding the question the New York Court of Appeals applied federal rather than state law. But it cannot be assumed, as petitioners do, that because the New York court cited two decisions of the Court of Appeals for the Second Circuit rather than any New York cases for what it deemed to be a "quite obvious" proposition, that it applied the wrong law. A subsequent decision of the court below, also involving the priority of a federal tax lien, makes it clear beyond doubt that in this case the Court of Appeals did decide the question on the basis of state law.

In any event, prior decisions of the New York Court of Appeals and of the Court of Appeals for the Second Circuit establish that New York law does

not treat the owner's indebtedness to the contractor as a true trust, and that the "trust fund" doctrine does not deprive the contractor of any property interest in the funds due him from the owner. In the circumstances, the court below correctly held that the owner's indebtedness to the contractor constitutes "property" of the latter to which the federal tax lien attached.

B. As an alternative argument, petitioners urge that the federal tax liens did not attach to the fund in suit for the reason that such fund was the property of the owner, not the taxpayer. This argument is premised upon the theory that they also had liens against the real property of the owner and that the fund was deposited in court in substitution therefor. This argument, rejected by the court below, overlooks the fact that the fund here involved represented the debt due the taxpayer from the owner and that the liens claimed by the petitioners are predicated upon the existence of that debt. Consequently, the fund deposited constituted property of the taxpayer to which the federal liens necessarily attached.

C. Finally, petitioners urge that this Court should re-examine the settled rule that a federal tax lien has priority over a previously filed mechanic's lien if the latter is "inchoate" in the sense that additional steps are required to perfect. While we believe that the rule is correct and that petitioners have shown nothing which warrants its re-examination, it would clearly not be appropriate to do so in the instant case. For here the federal tax liens arose many

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months before the subcontractors asserted any claims, and were properly recorded prior to the filing of petitioners' liens. This case, therefore, is governed by the principle—which petitioners do not challenge—that "the first in time is the first in right" (*United States* v. *New Britain,* 347 U.S. 81, 85). Since petitioners' liens were not "the first in time", they could not prevail even if inchoate state liens were to be treated as prior to subsequently filed federal liens.

## ARGUMENT

### FEDERAL TAX LIENS ON FUNDS DUE A CONTRACTOR ARE SUPERIOR TO THE CLAIMS OF SUBCONTRACTORS ASSERTED UNDER NEW YORK LAW WHERE THE SUBCONTRACTORS HAD NOT FILED NOTICES OF THEIR LIENS UNTIL AFTER THE FEDERAL TAX LIENS CAME INTO EXISTENCE

It is now "firmly established" (R. 67) that federal tax liens are entitled to priority over subsequently recorded mechanic's liens, or over previously recorded mechanic's liens, if further steps are required to perfect them. *United States* v. *Hulley,* 358 U.S. 66, summarily reversing 102 So. 2d 599 (Fla.); *United States* v. *White Bear Brewing Co.,* 350 U.S. 1010, summarily reversing 227 F. 2d 359 (C.A. 7); *United States* v. *Vorreiter,* 355 U.S. 15, summarily reversing 134 Colo. 543; *United States* v. *Colotta,* 350 U.S. 808, summarily reversing 224 Miss. 33; *United States* v. *Scovil,* 348 U.S. 218; *United States* v. *Acri,* 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co.,* 348 U.S. 215; *United States* v. *New Britain,* 347 U.S. 81; *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47. In the instant case, the federal tax liens came into ex-

istence many months before any claims were asserted by the subcontractors, and indeed many months before the subcontractors furnished the labor or materials which formed the basis for their claims. Under these settled principles, therefore, it would seem no longer open to question that the federal tax liens are entitled to priority over the claims of the subcontractors.

Although petitioners now suggest (Br. 27–34) that these settled principles should be reexamined (see discussion *infra,* pp. 23–24), their major argument involves only a question of state law. They contend (Br. 11–25) that since New York treats a contractor's claim against an owner as a "trust fund" for the benefit of subcontractors and materialmen, the Court of Appeals erred in holding that this claim constitutes "property" of the contractor to which the federal liens attached. But the interpretation of state law by the highest court of the state is binding upon this Court; in any event, as we shall show, under New York law the owner's indebtedness to the contractor is "property" of the latter. We shall further show that the federal lien cannot be defeated on the theory that the fund paid into court by the owner is merely in substitution for the real property itself, and therefore is not subject to the federal lien (which is on the indebtedness). Finally, we shall show that there is no occasion for reexamining this Court's prior decisions that federal liens have priority over inchoate state liens, since even the contrary rule would not give petitioners' liens priority in this case.

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A. THE INDEBTEDNESS OF THE OWNER TO THE TAXPAYER CONSTITUTED PROPERTY OF THE LATTER (TO WHICH THE FEDERAL TAX LIENS ATTACHED), NOTWITHSTANDING THAT NEW YORK TREATS SUCH INDEBTEDNESS AS A "TRUST FUND" FOR THE BENEFIT OF SUBCONTRACTORS AND MATERIALMEN

1. Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 26) provides that if any person liable to pay any tax neglects or refuses to pay such tax after demand, the amount thereof (together with any additions thereto) "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person". Section 3671 (Appendix, *infra,* p. 26) provides that unless another date is specifically fixed by law, the lien shall "arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

The assessment lists for the federal taxes here in question were received on December 27, 1951, and March 21, 1952 (R. 46), and, by virtue of the provisions of Section 3671, the federal tax liens became "perfected" on those dates. *United States* v. *New Britain,* 347 U.S. 81, 84. In July or August 1952, the taxpayer entered into a contract for improvements on property owned by Bottone and in early October, 1952, petitioner Colonial furnished materials to Fleetwood. (R. 40, 65–66.) On October 31, 1952, the United States filed notice of its liens in the office pro-

vided by state law. (R. 66.)[2] No claims were asserted by the petitioners until November, 1952, when they filed their liens. (R. 11, 40.)

The Court of Appeals held that it is "firmly established" by federal decisions that "once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it" (R. 67), and that under state law the government's lien, "concededly filed * * * before the [petitioners] filed their notices," "is indisputably effective against all personal property and rights thereto belonging to the taxpayer (Lien Law, § 240, subd. 2)" (R. 68). It therefore ruled (*ibid.*) that "decision herein depends solely on whether the indebtedness due to Fleetwood from Bottone constituted property of Fleetwood." The court stated (*ibid.*) that the federal lien "was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer," but "was asserted against the contractual obligation of Bottone to Fleetwood." It concluded (*ibid.*) that, despite the provision in the state's lien law upon which petitioners relied—"that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36-a; § 13, subd. [7]"—this "indebtedness" from Bottone

[2] While this filing antedated the assertion of claims by petitioners, it was not essential to the validity of the federal tax liens. Under Section 3672 of the 1939 Code (Appendix, *infra*, p. 26), such filing is required only as against mortgagees, pledgees, purchasers and judgment creditors. The claims of the petitioners do not fall within any of these categories.

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to the taxpayer was "quite obviously * * * personal 'property and rights to [such] property' belonging to the taxpayer" within the meaning of Section 3670 of the 1939 Internal Revenue Code.

In short, the Court of Appeals held that, despite the fact that New York treats the owner's indebtedness to the contractor as a "trust fund" for the benefit of subcontractors and materialmen, such indebtedness is "property and rights to property" of the taxpayer, to which the federal tax lien attaches. "What the statutes of a State mean, the extent to which any provision may be limited by other Acts * * * are questions on which the highest court of the State has the final word." *Musser* v. *Utah,* 333 U.S. 95, 98; see also, *Speiser* v. *Randall,* 357 U.S. 513, 519; *General Trading Co.* v. *Tax Commission,* 322 U.S. 335, 337; *Arkansas* v. *Texas,* 346 U.S. 368, 371.

2. Petitioners recognize (Br. 10–13), as indeed they must (see *United States* v. *Bess,* 357 U.S. 51), that whether Fleetwood had a property interest in the sum due from Bottone is a question of state law. They contend (Br. 13, 18–20), however, that the Court of Appeals' decision of the question rested on the court's application of federal, rather than state, law; and that, because of the New York trust fund doctrine, state law does not treat the indebtedness as property of the contractor. Their argument is based on the fact that the Court of Appeals, in holding that the indebtedness is property, cited two decisions of the

Court of Appeals for the Second Circuit,[3] rather than any state cases.

But it cannot be presumed that because the New York court did not cite any state decisions for what it deemed to be a "quite obvious" proposition, it therefore applied the wrong law. Indeed, petitioner made precisely the same contention in seeking re argument in the Court of Appeals,[4] but the court denied the motion (R. 73). And, if there should be any doubt that the court applied state rather than federal law in ascertaining the extent of the taxpayer's property interests, it is dispelled by the court's subsequent decision in *In Re Washington Square Slum Clearance,* 5 N.Y. 2d 300, pending on petition for a writ of certiorari *sub nom. United States* v *Coblentz,* No. 259, this Term. There, in holding that an attorney's lien on part of the proceeds of a condemnation award had priority over a federal tax lien on the same proceeds, the court flatly stated (5 N.Y. 2d at 314) that "The determination of what constitutes property of a taxpayer on the date of the asserted lien

[3] *United States* v. *Kings County Iron Works*, 224 F. 2d 232 and *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F. 2d 142.

[4] They there stated (R. 76): "The Court, by citing Federal cases which purport only to classify for Federal purposes fundamental interests created by the law of the State of New York, assumes without further comment that such an interest exists under local law which a court may classify as 'property and rights to (such) property' within the terms of Title 26 Sec. 3670, United States Code. In making this assumption respondents feel that the court overlooked their fundamental argument that no such interests exist under New York law (respondent Aquilino's brief, pp. 9–16)."

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by the Government is a matter of State law." As one of three authorities for this proposition, it cited its prior decision in the instant case.

3. In any event, the fact that New York law treats the indebtedness of an owner to a contractor as a "trust fund" for the benefit of subcontractors and materialmen does not make such indebtedness any the less "property" of the contractor. For the New York Court of Appeals has held that these statutory provisions for the protection of subcontractors and materialmen do not "create a real trust fund to remain such under any and all contingencies from the time the contractor * * * first received payment" from the owner; and that the contractor, therefore, has the right to use the funds received from the owner for his own purposes. *Raymond Concrete Pile Co.* v. *Federation Bank,* 288 N.Y. 452, 462; *Saltser & Weinsier, Inc.* v. *Monroe Plumbing & Heating Supply Corp.,* 290 N.Y. 903. A like construction has been given the statute by the Court of Appeals for the Second Circuit in *Gramatan-Sullivan, Inc.* v. *Koslow,* 240 F. 2d 523, certiorari denied, 353 U.S. 958.

In the *Raymond* case the question was whether the defendant bank had the right to apply funds received by a contractor from the owner for public improvement construction, and deposited in the bank, to the satisfaction of the contractor's indebtedness to the bank, notwithstanding the claims of subcontractors.[5] The court held that, in the absence of direct notice of any claims by subcontractors, the bank had the right

[5] In that case the court was concerned primarily with the provisions of Section 25–a of the New York Lien Law creat-

to apply the sums received by the contractors to th satisfaction of its own claim. It ruled that the stat ute did not create a "real trust" under any and al circumstances from the time the contractor first re ceived payment, and that it did not bar the contracto from using the funds received for any purpose h saw fit, provided that he ultimately paid the subcon tractors out of other funds. The court stated (pp 459, 462):

> The most that the statute does or was designe to do in that respect is to create the possibilit of a fiduciary relationship arising between th contractor as to funds coming into his hand from a public improvement contract and a pos sible subcontractor or possibly others desig nated. * * * Nothing in the section bars th contractor from using the moneys received fo any purpose he may see fit provided he doe not fail to pay all such claims out of othe moneys which he may then have or which h may afterwards receive; and nothing in th section bars a banker from applying moneys if on deposit in the contractor's account at th bank, without inquiry, upon the contractor' indebtedness to the bank. It necessarily fol lows that no trust arises under that sectio from the mere fact that the contractor received and has in his hands moneys in payment o account of a public improvement.
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ing a trust fund of moneys received by a contractor on public improvements. The court noted, however, that the provisions of Section 25-a were identical to those of Section 36-a, here involved, applicable to private improvements. 288 N.Y., p 461.

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> In clear terms those sections [25–a, 25–b, 36–a, 36–b] were not intended to create a real trust fund to remain such under any and all contingencies from the time the contractor or subcontractor first received payment on account of public or private improvements respectively. * * *

In an analogous situation, involving a payment to the assignee of a creditor of the contractor to the prejudice of a subcontractor, a judgment in favor of the creditor's assignee was affirmed without opinion. *Saltser & Weinsier, Inc.* v. *Monroe Plumbing & Heating Supply Corp., supra.*

In *Gramatan-Sullivan, Inc.* v. *Koslow, supra,* the same problem was presented and contentions similar to those here advanced were there urged. The Court of Appeals, in an opinion by Judge Learned Hand, rejected the contention that the moneys received by the contractor constituted a trust fund for all purposes and could not be used except for the payment of existing future claims of subcontractors. It stated (240 F. 2d, p. 525):

> The plaintiff's position is that § 36–a makes all interim payments on a building job a trust fund, not only for the benefit of existing claims of "subcontractors," but of future claims that may arise thereafter as the work progresses. The contractor must keep intact all such payments save that he may pay claims of other "subcontractors" as they fall due. If he uses the payments for any other purpose, he is guilty of larceny, and anyone who receives them is liable, at least civilly to "subcontractors", present and future, if he knows, * * *. The privilege to pay claims as they mature, itself

> shows that the trust is not of the usual kind, for its exercise may result in giving earlier claimants a preference over later: e.g. if the contractor fails to earn any later payments. However, that privilege would not justify a privilege to use the payments for the contractor's own purposes, had not the section declared that a contractor is guilty of larceny, if he not only fails to apply the payments to the "claims of subcontractors" but that he also "fails to pay the claims". In short, if he pays the claims from other resources, he is not guilty of larceny, though he has used the payments for other purposes. * * *

Judge Hand then quoted extensively the language of the New York Court of Appeals in the *Raymond* case set forth *supra*.

These decisions of the New York courts, and of the federal appellate court in New York, authoritatively demonstrate that the trust fund doctrine does not have the effect of depriving the contractor of all property rights to the funds received from the owner.[6]

[6] Petitioners' citation of cases from lower New York courts dealing with the rights of judgment or other creditors to funds owed by the owner to a contractor (Br. 13–15) and of cases arising under the Bankruptcy Act (Br. 16–17) is inapposite. The cases holding that judgment creditors' rights are inferior to those of subcontractors were decided under Section 13 of the New York Lien Law, which expressly subordinates the liens of creditors, judgment creditors or attachment creditors, among others, to those of subcontractors, unless such creditors' claims arose from labor or material supplied to the same property. *Corbin-Kellogg Agency* v. *Tasker*, 248 App. Div. 58. Obviously, the New York statute does not purport to subordinate the claims of the United States arising under federal tax liens to those of subcontractors, nor could it

To the contrary, they show clearly that no real trust is created; that the contractor has the right to use the funds received for his own purposes, subject only to his obligation to pay the subcontractors out of other funds held by him or thereafter to be received by him; and that creditors may apply such funds to satisfy their claims against the owner. Moreover, in New York as elsewhere, the rights of the subcontractors are wholly dependent upon the existence of an indebtedness owing to the contractor by the owner. If no such indebtedness exists when the subcontractor files notice of his lien or thereafter, the subcontractor may not enforce his lien against the owner or his property. *Herrmann & Grace* v. *Hillman,* 203 N.Y. 435; *Van Clief* v. *Van Vechten,* 130 N.Y. 571.

In the instant case, therefore, Fleetwood would not have been precluded from using the funds due from the owner for its personal use, even though such funds are treated under New York law as a species of "trust fund" for the benefit of subcontractors and materialmen. In these circumstances, the court below correctly held that the taxpayer's

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properly do so. The cases arising under the Bankruptcy Act would seem to involve the application of a similar theory. For since the rights of creditors are inferior to those of subcontractors, it could properly be reasoned that the rights of the trustee in bankruptcy, who represents such creditors and who occupies the position of a judgment creditor, are similarly inferior. Parenthetically, it may be noted that *Wickes Boiler Co.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415 (C.A. 2), certiorari denied, 314 U.S. 686, did not involve the assertion of any priority by the Government, as petitioners assert. (Br. 16.) There is no indication that the Government was a party to that case.

right to the fund owing by the owner, Bottone, fell "quite obviously" within the federal statutory terms "property and rights to property" of the taxpayer. (R. 68.) Indeed, it is difficult to understand the basis for the contention that because the state has determined the priority in which various creditors are to be paid out of a fund due the taxpayer, the latter has no property interest therein to which the federal tax lien attaches. Here the state law does no more than provide that the owner's indebtedness to the taxpayer is to be used for paying certain of the latter's creditors; any rights such creditors have in the fund necessarily depend upon the taxpayer's interest therein.

In short, the federal tax liens attached to the owner's obligation to the taxpayer at a time when petitioners' claims against taxpayer had not even come into existence, and long before they had given notice of such liens. The court below, therefore, correctly ruled that the federal liens had priority.

As this Court stated in *United States* v. *Bess*, 357 U.S. 51, 56–57:

> [O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. * * *

See also, the discussion at pages 13–15 and 23–25 of the Government's brief in *United States* v. *Durham Lumber Co.*, No. 23, this Term.

In *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C.A. 2), which petitioners concede (Br.

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18), "on its facts * * * is admittedly indistinguishable from the case at bar," the court held that a federal tax lien was entitled to priority over a subsequently filed mechanic's lien. It expressly rejected the contention (p. 235) that "the trust fund given by these [New York] statutory provisions * * * divests the contractor of his property interest in his chose in action against the property owner * * * for federal tax purposes." The court stated (pp. 235–236):

> Until and unless the mechanic's lienor perfects his rights to the trust fund by filing a timely civil action in accordance with § 75 of N.Y. Lien Law, the contractor retains a paramount interest in the property in question, so that the debt belongs to him and is subject to federal levy as such.[7] * * *

[7] Petitioners seek to impair the force of that decision by relying upon language in the subsequent decision of the Second Circuit in *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142, which they construe as indicating that in *Kings County* the court did not inquire whether state law created a property right in the taxpayer, but merely assumed that it did. (Br. 18–19.) The language relied upon by petitioners, however, is quoted out of context. When the entire paragraph (appearing at 241 F. 2d, p. 145) is read, it becomes clear that the property "right" to which the Second Circuit referred in *Fidelity & Deposit* was the right of the subcontractors, not the right of the taxpayer.

Petitioners further rely on the *Fidelity & Deposit* case affirmatively to support their argument that the taxpayer had no property interest in the fund. Such reliance is wholly misplaced. For there the construction contract contained a specific provision requiring the payment of subcontractors as a condition precedent to the right of the contractor to receive any part of the contract price. The Second Circuit accordingly held that, since the contractor was in default under this provision, he could not recover the contract price and that, conse-

B. THE FUND DEPOSITED BY THE OWNER IN COURT CONSTITUTED PROPERTY OF THE TAXPAYER TO WHICH THE FEDERAL TAX LIEN ATTACHED

As an alternative theory for establishing priority for their mechanic's liens, petitioners contend (Br. 25–27) that the fund of $2,200 which the owner paid into court represented property of the owner rather than of the taxpayer; and that since the federal lien attaches only to property of the taxpayer, it could not reach the fund. They argue that they also had a mechanic's lien on the real property (in addition to a "trust fund" claim against the indebtedness), which they brought suit to foreclose; and that the money which the owner deposited in court, representing the balance due under the contract, must be viewed as a substitute for the realty.

This argument in nothing more than a revised version of the contention, advanced at Special Term, and adopted by that court (R. 53), that the federal tax lien was in reality a lien against real property and was, therefore, not filed in the proper office under

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quently, there was no debt due to the taxpayer to which the federal lien could attach. This conclusion was reached purely as a matter of state contract law and the court recognized that, under its earlier decision in *Kings County*, the trust fund rights of the subcontractors constituted only a lien which was junior to the federal tax lien.

In the instant case there were no comparable provisions in the contractual arrangements between the owner and the contractor, and the *Kings County* case is fully applicable. Petitioners' statement (Br. 20) that the parties to a construction contract may avoid the impact of the decision below merely by inserting a *Fidelity & Deposit* provision in their agreement, is beside the point. For assuming the correctness of *Fidelity & Deposit*, it is not unusual that parties by contract may change their respective property rights.

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state law. This argument, however, was rejected by the Appellate Division (R. 63) and by the Court of Appeals (R. 68), which ruled (*ibid.*) that the federal lien "was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer. It was asserted against the contractual obligation of Bottone to Fleetwood * * *." The money which the owner paid into court was the amount remaining unpaid under her contract with the taxpayer; it obviously constituted the payment of her indebtedness to the latter. As the court below held, this debt of $2,200 from the owner to the taxpayer constituted property of the latter, to which the federal tax lien attached. This being so, it is immaterial whether, for other purposes and in other contexts, it might also be viewed as in substitution for the owner's real property.

C. THERE IS NO OCCASION HERE FOR RE-EXAMINATION OF THE SETTLED RULE THAT FEDERAL LIENS HAVE PRIORITY OVER PREVIOUSLY FILED STATE-CREATED MECHANIC'S LIENS WHICH REQUIRE FURTHER STEPS FOR THEIR PERFECTION

Finally, petitioners urge (Br. 27–33) that if this Court accepts the holding below that the indebtedness of the owner to the contractors constitutes "property" of the latter, it should re-examine and overturn the settled rule that a federal tax lien has priority over a previously filed mechanic's lien if the latter is "inchoate" in the sense that additional steps are required to perfect it (see *supra*, p. 9, and the discussion of this rule at pp. 14–15 of the Government's brief in *United States* v. *Durham Lumber Co.*, No. 23, this

Term).[8] While we believe that the rule is correct and that petitioners have shown nothing which calls for its re-examination, the instant case would plainly not be an appropriate vehicle for doing so. For even if the Court were to change the rule, the result here would be the same—petitioner' liens would still be subordinate to the federal liens.

The federal tax liens in this case arose many months before any claims were asserted by any of the subcontractors and, indeed, before the subcontractors even agreed to perform the services or furnish the materials which their mechanic's liens cover. They were properly recorded in accordance with state law (R. 68), prior to the filing of petitioners' liens. This case, therefore, is governed by the principle—which petitioners do not challenge—that "the first in time is the first in right" (*United States* v. *New Britain,* 347 U.S. 81, 85). Since petitioners' liens were not "the first in time," it is immaterial whether, had they been so, they would nevertheless have been subordinate to the federal liens because they were still inchoate.

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[8] Petitioners did not raise this issue in their petition, but limited themselves to the sole question whether the taxpayer's interest in the owner's indebtedness constituted "property" of the taxpayer. See Pet. 2, 6–17.

## CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1959

## APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672. [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASES, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial laws.*—In the office in which the filing of such notice is au-



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thorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

New York Lien Law, 32 McKinney's Consolidated Laws of New York:

SEC. 3. *Mechanic's lien on real property*

A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. * * *

* * * * *

SEC. 4. *Extent of lien*

(1) Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit

of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

* * * * *

SEC. 13. *Priority of liens.*

* * * (7) The moneys received by a contractor or subcontractor under any assignment of moneys or any part thereof, due or to become due under a contract for the improvement of real property, whether or not such assignment contains the covenant required by subdivision six of this section, are hereby declared to be trust funds in the hands of such contractor or subcontractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and materialmen arising out of the improvement and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement. Any contractor or subcontractor and any officer, director or agent of any contractor or subcontractor who applies or consents to the application of such moneys for any other purpose

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and fails to pay claims hereinbefore mentioned, is guilty of larceny and is punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purposes of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor or subcontractor, as well as moneys actually received by him.

Nothing in this subdivision shall be considered as imposing upon the assignee any obligation to see to the proper application of the moneys advanced under such assignment by the assignee.

* * * * *

SEC. 36–a. *Contractor who diverts funds guilty of larceny; civil remedy to enforce trust.*— The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of

this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

---

COLONIAL SAND AND STONE CO., INC., Petitioners,

*v.*

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITIONER'S REPLY BRIEF

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## INDEX


PAGE

The Fund in Question Is Not the Property of the Taxpayer as a Matter of State Law, Nor Did the New York Court of Appeals Below Decide it Was 1

Respondent Has No Lien Against the Real Property Belonging to the Owner, and Therefore Has No Right to the Fund Substituted Therefor ..... 7

This Case Is an Appropriate Vehicle for Re-examining the Rule Granting Absolute Priority to the Federal Lien, and That Rule Should Be Changed 8


### Cases Cited


Cranford Co. v. Leopold & Co., 189 Misc. 388, 391-392, affd. 273 App. Div. 754, affd. 298 N. Y. 676 2, 3

Fidelity & Deposit Co. of Maryland v. New York City Housing Authority, 241 F. 2d 142 ..... 6, 7

Gramatan-Sullivan, Inc. v. Koslow, 240 F. 2d 523, certiorari denied, 353 U. S. 958 .....2, 3, 4, 5

Raymond Concrete Pile Co. v. Federation Bank & Trust Co., 288 N. Y. 452, 43 N. E. 2d 486 .....2, 3, 4

Saltser & Weinsier, Inc. v. Monroe Plumbing and Heating Supply Corp., 290 N. Y. 903 .....2, 3, 4

United States v. Bess, 357 U. S. 51 ..... 5

United States v. Coblentz, 5 N. Y. 2d 300 ..... 5

United States v. Durham Lumber Co., No. 23 ..... 8

United States v. Kings County Iron Works, 224 F. 2d 232 ..... 7

United States v. Security Tr. & Savings Bank, 340 U. S. 47 ..... 8

## Statutes Cited

PAGE

Lien Law, § 36-a ..... 4

§ 3672 (26 U.S.C. 1952 Ed., Sec. 3672) ..... 6

§ 3670 (26 U.S.C. 1952 Ed., Sec. 3670) ..... 6

## Miscellaneous

"Act, Recommendation and Study Relating to the Trust Fund Provisions of the Lien Law," 1942 Report New York State Law Revision Commission ..... 4

"Trust Fund Provisions of the Lien Law," 1959 Leg. Doc. No. 65 (F) ..... 5

In the

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

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Robert Aquilino and Joseph Spero, doing business as Home Maintenance Company, Petitioners,

*v.*

United States of America, Ada Bottone, Fleetwood Paving Corporation, and Colonial Sand and Stone Co., Inc.,

---

Colonial Sand and Stone Co., Inc., Petitioner,

*v.*

United States of America, Ada C. Bottone, doing business as Mario's Miramare Restaurant,

Fleetwood Paving Corporation, Robert Aquilino and Joseph Spero, doing business as Home Maintenance Co.

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## PETITIONER'S REPLY BRIEF

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### The Fund in Question Is Not the Property of the Taxpayer as a Matter of State Law, Nor Did the New York Court of Appeals Below Decide it Was.

Respondent in its brief contends that the New York Court of Appeals, in the instant case below, decided that the fund in question was, as a matter of state law, prop-

erty of the taxpayer to which the federal tax lien could attach. After admitting and taking unto themselves petitioner's argument that the determination of what is "property" or "rights to property" is a matter to be ascertained by reference to and on the basis of state law, they rely, in essence, upon (a) certain language quoted out of context from the opinion below, and (b) three cases,[1] two in the New York Court of Appeals and one in the Court of Appeals for the Second Circuit, to establish that the Court below did decide such question on the basis of state law.

Respondent's reliance upon the quoted language (Respondent's brief, pp. 12-13) and opinions is patently unfounded and erroneous. First, the language from the opinion of the court below, when read in conjunction with the paragraph immediately following that quoted by respondent, supports petitioner's contention that state law was *not* applied. The Court there stated that,

> "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (Citations omitted.) That being so, it follows that the provision in this state's Lien Law, to which respondents (here, petitioners) point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36-a, § 13, subd. [7])—*may not* be construed to affect the rights of the government or the priority of its tax lien." (Emphasis supplied.) (R. pp. 68-69)

The Court's note to such statement, to wit, that "To the extent that *Cranford Co.* v. *Leopold & Co.* (189 Misc.

[1] *Raymond Concrete Pile Co.* v. *Federation Bank & Trust Co.*, 288 N. Y. 452; *Saltser & Weinsier, Inc.* v. *Monroe Plumbing and Heating Supply Corp.*, 290 N. Y. 903; *Gramatan-Sullivan, Inc.* v. *Koslow*, 240 F. 2d 523.

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3, 391-392, affd. 273 App. Div. 754, affd. 298 N. Y. 676), ggests the contrary, *it must give way to more recent leral decisions"* (Emphasis supplied) illuminates the urt's deference to inapplicable federal decisions therein ed even more clearly since it specifically subjugates, does not overrule, an applicable state decision. The urt specifically "gives way to more recent federal de-ions"—yet respondent contends that they applied state , a proposition which is clearly negatived by the fore-ng language of the court.

The two cases decided by the New York Court of Ap-ls upon which respondent relies (*Raymond Concrete e Co.* v. *Federation Bank,* 288 N. Y. 452; *Saltser & insier, Inc.* v. *Monroe Plumbing and Heating Supply p.,* 290 N. Y. 903) constituted a construction of the Lien v as it existed *prior to* the 1942 amendment to said v.[2] Petitioner would assume that respondent was un-ıre of the vitiating effect upon these decisions of the 2 amendment, were not the impact of that legislation set h in detail in the dissenting opinion of Chief Judge rk in *Gramatan-Sullivan, Inc.* v. *Koslow,* 240 F. 2d 523, iorari denied, 353 U. S. 958[3]—a case which is also d by the respondent.

he New York Law Revision Commission did not have pportunity to comment upon the *Raymond* case, in its

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L. 1942, c. 808.

Chief Judge Clark there stated: "My brethren cite *Raymond rete Pile Co.* v. *Federation Bank & Trust Co.,* 288 N. Y. 452, . E. 2d 486, as requiring this result. Even if that case sup-d the defendant's view, it would not help us here, inasmuch e case involved the original trust fund provisions before the al 1942 amendments. Since the opinion of the Court of als was filed after the Law Review Commission completed its , the Commission had no opportunity to say how much of that on remained good law after passage of the amendments. The nission did approve the Appellate Division result, however, the Court of Appeals reversed. The first ground of the opinion—that the trust fund sections are only criminal and not -was clearly overruled by the amendments."

Report,[4] since that case was decided by the New York Court of Appeals *after* the Commission's report was rendered. However, the report did comment with favor upon the Appellate Division decision in that case which was reversed. The Commission's recommendation was adopted by the legislature, and said 1942 amendment clearly evidences a legislative intent to uphold, approve and codify the opinion of the *Appellate Division.* The Court of Appeals in the *Raymond* case predicated its opinion upon (1) lack of evidence, and (2) a conclusion that § 36-a of the Lien Law was solely penal in nature and provided no concurrent civil remedy. The evidentiary basis for their decision is not relevant here, and the 1942 amendment to § 36-a does specifically provide a civil remedy. Thus, since said 1942 amendment, the Court of Appeals decision in the *Raymond* case is meaningless and no longer authority in the State of New York.

The *Saltser* case also arose prior to the 1942 amendment. That decision states that "no rights accrued to plaintiff by virtue of the Lien Law (§ 36-a) in the absence of the filing of a lien by plaintiff." The statute, as amended in 1942, states: "Such trust may be enforced by civil action * * * by any person entitled to share in the fund, *whether or not he shall have filed, or had the right to file a notice* of lien * * *." (Emphasis supplied.) Thus, the holding in the *Saltser* case was also clearly overruled by statute.

*Gramatan-Sullivan, Inc.* v. *Koslow, supra,* is not authority in the State of New York, having been decided by the Court of Appeals for the Second Circuit, which, as respondent agrees (Respondent's Brief, P. 13) does not have the "final word." The substantive error of the opinion is adequately presented by Chief Judge Clark in his dissent from that opinion, which "adopt[ed] a construction of the

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[4] "Act, Recommendation and Study relating to the Trust Fund Provisions of the Lien Law," 1942 Report, New York State Law Revision Commission.

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amended statute which war[red] with its language, its legislative history, and New York case law, and which clash[ed] with other parts of the statutory scheme.'"[5] The New York Legislature has eliminated all doubts raised by that opinion by once again amending the lien law.[6] The Legislative reports[7] specifically deal with the *Gramatan-Sullivan, Inc.* case. and clearly indicate that such decision did not set forth an accurate statement of the New York Lien Law. The Report states that "The principal purpose of those amendments [1958] was to make it clear that the right of trust beneficiaries to enforce the trust in a civil action does not depend on the time when their claims arose or matured, and that application of trust funds to a purpose other than payment of trust claims is a misappropriation unless all trust claims then in existence or later arising are satisfied." The amendments thus attempted to resolve the problems raised by the *Gramatan-Sullivan, Inc.* v. *Koslow* case. Other considerations delayed the enactment of this legislation until 1959, but the delay in no way diminishes the legislature's disapproval of that case.

Thus, none of the cases cited by respondent are valid, subsisting expressions of the status and effect of the New York Lien Law.

The decision of the New York Court of Appeals in *In Re Washington Square Slum Clearance; United States* v. *Coblentz*, 5 N. Y. 2d 300 was based upon that court's recognition of petitioner's argument that state law must control the definition of property—a recognition inspired by this court's decision in *United States* v. *Bess*, 357 U. S. 51. There, the Court's citation of the instant case below indicated that it was thinking of the instant case in terms of

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[5] *Gramatan-Sullivan, Inc.* v. *Koslow* (dissenting opinion), 240 F. 2d 523 at 530-1.

[6] L. 1959, C. 696.

[7] "Trust Fund Provisions of the Lien Law," 1959 Leg. Doc. No. 65(F).

perfection of lien under § 3672 (26 U.S.C. 1952 Ed., Sec. 3672), rather than as a question of what constitutes "property" of the taxpayer under § 3670 (26 U.S.C. 1952 Ed., Sec. 3670). Factually, the court in the instant case did not reach the question of whether the fund in question herein constitutes "property" or "rights to property" of the taxpayer—the determination of which is essential to the proper disposition of this case.

Respondent herein begs the question when it states that the subcontractor under New York law may not enforce his lien if the general contractor has already been paid by the owner, since the trust fund provisions of the Lien Law seek, in part, to remedy this very problem. It was to prevent the general contractor from obtaining payment from the contractor and leaving the subcontractor without remedy that the legislature established the trust and included therein, as part of the trust *res*, any monies or indebtedness due or to become due from the owner to the general contractor.

Contrary to respondent's contention that petitioner's reference to *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority*, 241 F. 2d 142, is "beside the point," the underlying philosophy of the Lien Law—the protection of the small and otherwise defenseless workman or subcontractor—indicates that the concurrent authority of *Fidelity & Deposit* and the decision below should not exist. The government states that "it is not unusual that parties by contract may change their respective property rights"—which is true. However, it is not usual that parties may do by contract that which the legislature is unable to do by statute—which would be the situation here. An affirmance of this decision would be equivalent to a pronouncement that well-advised subcontractors may protect themselves against the federal tax lien, but the small workman or subcontractor for whom the Lien Law was enacted is without defense.

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We do not believe that petitioner's brief contains any distortion of the sense and meaning of either the *Fidelity & Deposit Co.*, case or its comment on *United States* v. *Kings County Iron Works*, 224 F. 2d 232. Careful analysis of the language quoted from the opinion in the *Fidelity & Deposit* case, when read in conjunction with the *Kings County* case, reveals that the Court in *Fidelity & Deposit* recognized, as was indeed the case, the fact that the Court in *Kings County* did not inquire into the rights of the taxpayer, if any, in the fund, but rather assumed that such rights existed.[8]

## Respondent Has No Lien Against the Real Property Belonging to the Owner, and Therefore Has No Right to the Fund Substituted Therefor.

Respondent's statement that petitioner's argument, which established that the fund which was substituted for the real property herein was not subject to the federal lien, was addressed to the place of filing is completely untrue. Petitioner's contention (Br., p. 25-27) is addressed to the fact that respondent's claim is derivative—and, with respect to the real property or the fund substituted therefor by statute, cannot rise higher than the claim of the tax-

[8] The court in *Kings County* stated: "Nor can Standard's [the owner's] refusal to surrender these moneys be justified by reference to provisions in its contract with Preferred [the taxpayer] concerning payment of subcontractors. Such private contractual arrangements are clearly subordinate to the paramount rights of the government to levy on the property of its taxpayers" (224 F. 2d at 236). The court there clearly assumed that the moneys were the property of the taxpayer—an unwarranted assumption which the court in *Fidelity & Deposit* recognized in the language quoted by petitioner (Petitioner's Brief, pp. 18-19). The court in *Fidelity & Deposit* specifically disapproved of the language above quoted, stating: "But here we are concerned with the question of whether or not a contractual right exists and that we hold is a matter of state law only." The court in *Fidelity & Deposit* was not, as respondent contends approving the decision in *Kings County;* it was distinguishing that decision by demonstrating the erroneous assumption made by the court.

payer. As a result, the federal lien can attach only to the taxpayer's rights to the real property—which rights are subordinated by statute to those of the petitioner. The federal lien may be effective without filing, but it does not operate to perfect the claim of the taxpayer. This is a fundamental distinction between this case and the line of cases commencing with *United States* v. *Security Tr. & Savings Bank*, 340 U. S. 47—in those cases the parties were claiming funds which indisputably belonged to the taxpayer.

**This Case Is an Appropriate Vehicle for Re-examining the Rule Granting Absolute Priority to the Federal Lien, and That Rule Should Be Changed.**

The instant case and its companion—*United States* v. *Durham Lumber Co.*, No. 23, this Term, clearly raise the problems flowing from the *Security Trust* decision, and a reconsideration of the issues raised therein bears directly upon the decision herein. Should the court decide, as Petitioner contends, that the federal lien is entitled to no different treatment than a judgment lien under state law, as a matter of state law petitioner's lien must prevail. Therefore, the issues as raised in petitioner's brief are clearly relevant.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 1.—October Term, 1959.

| | |
|---|---|
| Robert Aquilino and Joseph Spero, d/b/a Home Maintenance Company, and Colonial Sand and Stone Co., Inc., Petitioners, *v.* United States of America, Ada Bottone, et al. | On Writ of Certiorari to the Court of Appeals of the State of New York. |

[June 20, 1960.]

Mr. Chief Justice Warren delivered the opinion of the Court.

In this case we are asked to determine which of two competing claimants—the Federal Government by virtue of its tax lien, or certain petitioning subcontractors by virtue of their rights under Section 36-a of the New York Lien Law—is entitled to a sum of money owed under a general construction contract which was performed by the taxpayer.

The taxpayer, Fleetwood Paving Corporation, is a general contractor, which in July or August 1952, agreed to remodel a restaurant belonging to one Ada Bottone, herein referred to as the owner. The petitioners in August and September of that year entered into a subcontract with the taxpayer to supply labor and materials for the remodeling job. Shortly thereafter, the petitioners performed their obligations under the subcontract, but were not fully compensated by the contractor-taxpayer. Therefore, on November 3, 1952, and on November 10, 1952, they filed notices of their mechanic's liens on the owner's realty in the office of the Clerk of West-

chester County. In June 1953, they instituted actions in the New York Supreme Court to foreclose those liens.

By order of court, the owner was permitted to deposit with the Clerk of the court the $2,200 which she still owed under the original construction contract, and she was thereafter dismissed as a defendant in the action. The Government, having previously levied upon the owner's alleged indebtedness to the taxpayer, was permitted by the court to enter the case as a party defendant.

The Government asserted precedence over the claims of petitioners because of the following facts: The Director of Internal Revenue in December 1951 and March 1952 received assessment lists containing assessments against the taxpayer for unpaid federal withholding and social security taxes. On October 31, 1952, the Director filed a notice of federal tax liens in the office of the Clerk of the City of Mount Vernon, New York, which is the city wherein the taxpayer maintained its principal place of business. The Government claimed priority for its tax lien under Sections 3670 and 3671 of the Internal Revenue Code of 1939.[1] The petitioners contended that since the contractor-taxpayer owed them more than $2,200 for labor

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[1] Section 3670:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty additional amount, or addition to such tax, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether rea or personal, belonging to such person."

Section 3671:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or become unenforceable by reason of lapse of time."

These provisions also appear in the 1954 Code. Int. Rev. Code of 1954, §§ 6321, 6322.

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and materials supplied to the job, under the New York Lien Law, Section 36–a,[2] he had no property interest in the $2,200 which the owner still owed under the original remodeling contract.

The New York Supreme Court, Special Term, 140 N. Y. S. 2d 355, granted petitioners' motion for summary judgment. The ground for the decision was that the Government's tax lien was ineffective since it had not been filed in the office designated by New York law for the filing of liens against realty. On appeal, the Appellate Division affirmed, but on the ground that there was no debt due from the owner to the taxpayer to which the Government's lien could attach, 2 App. Div. 2d 747, 153 N. Y. S. 2d 268. The court reasoned that the fund

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[2] McKinney's N. Y. Laws, Lien Law (1958 Supp.), § 36–a, provides as follows:

"The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him."

Section 36–a was repealed on September 1, 1959. N. Y. Laws 1959, c. 696, § 14. The subject matter covered by § 36–a is now included in McKinney's N. Y. Laws, Lien Law (1959 Supp.), §§ 70, 71.

deposited by the owner was a substitute for her realty to which the mechanic's liens had attached; and that since the Government had no lien on the owner's property, it could have no lien on the fund substituted for that property. On appeal, the New York Court of Appeals held that the tax lien had taken effect prior to the petitioners' claims. It therefore reversed the lower New York courts, and ruled that the motion of the United States for summary judgment, rather than that of petitioners, should have been granted by the Supreme Court, Special Term. 3 N. Y. 2d 511, 146 N. E. 2d 774. We granted certiorari, 359 U. S. 904.

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute." [3] *Morgan* v. *Commissioner*, 309 U. S. 78, 82. Thus, as we held only two Terms ago, Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law. . . ." *United States* v. *Bess*, 357 U. S.

[3] It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

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51, 55.[4] However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property."[5] *United States* v. *Vorreiter*, 355 U. S. 15, reversing 134 Colo. 543, 307 P. 2d 475; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, reversing 227 F. 2d 359; *United States* v. *Colotta*, 350 U. S. 808, reversing 224 Miss. 33, 79 So. 2d 474; *United States* v. *Scovil*, 348 U. S. 218; *United States*

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[4] It is said that because of the unique circumstances which existed in *Bess*, that case does not control here. However, aside from the fact that *Bess* involved proceeds payable under an insurance policy, whereas this case involves proceeds payable under a construction contract, it is apparent that the relevant circumstances of the two cases are essentially identical. In both cases the Government was attempting to assert its tax lien against what it thought to be the "property and rights to property" of the taxpayer. In both cases an adverse party claimed the right to the property in question on the theory that the taxpayer had never acquired a state-created property interest to which the Government's tax lien could attach. Finally, in both cases, the Government attempted to characterize the problem as one involving a conflict between competing claimants to be settled solely by the application of federal law.

*Bess* held that state law determines the property interests of a taxpayer in the cash surrender value of an insurance policy, as well as in the proceeds payable upon death. The same considerations which lead to our conclusion in *Bess* require that we look to state law in determining the general contractor's property interests in this case.

[5] It is suggested that the rule announced by *Bess* and applied in this case is inconsistent with the mandate that federal law governs the relative priority of federal tax liens and state-created liens. However, we fail to perceive wherein lies the inconsistency. It is one thing to say that a taxpayer's property rights have been and should be created by state law. It is quite another thing to declare that in the interest of efficient tax administration one must look to federal law to resolve the conflict between competing claimants of the taxpayer's state-created property interests.

v. *Liverpool & London & Globe Ins. Co.*, 348 U. S. 215; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *City of New Britain*, 347 U. S. 81; *United States* v. *Gilbert Associates*, 345 U. S. 361; *United States* v. *Security Trust & Sav. Bank*, 340 U. S. 47; *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U. S. 353. The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.

Petitioners contend that the New York Court of Appeals did not make its determination in the light of these settled principles. Relying upon the express language of Section 36–a of the Lien Law and upon a number of lower New York court decisions interpreting that statute, petitioners conclude that the money actually received by the contractor-taxpayer and his right to collect amounts still due under the construction contract constitute a direct trust for the benefit of subcontractors, and that the only property rights which the contractor-taxpayer has in the trust are bare legal title to any money actually received and a beneficial interest in so much of the trust proceeds as remain after the claims of subcontractors have been settled. The Government, on the other hand, claims that Section 36–a merely gives the subcontractors an ordinary lien, and that the contractor-taxpayer's property rights encompass the entire indebtedness of the owner under the construction contract.

This conflict should not be resolved by this Court, but by the highest court of the State of New York. We cannot say from the opinion of the Court of Appeals that it

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has been satisfactorily resolved.[6] We find no discussion in the court's opinion to indicate the nature of the property rights possessed by the taxpayer under state law. Nor is the application to be made of federal law clearly defined. We believe that it is in the interests of all concerned to have these questions decided by the state courts of New York. We therefore vacate the judgment of the Court of Appeals, and remand the case to that court so that it may ascertain the property interests of the taxpayer under state law and then dispose of the case according to established principles of law.

*Vacated and remanded.*

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[6] Subsequent to the Court of Appeals' decision in the instant case, and after this Court's decision in *United States* v. *Bess*, 357 U. S. 51, the New York Court of Appeals decided the case of *In the Matter of the City of New York*, 5 N. Y. 2d 300, 157 N. E. 2d 587, pending on petition for a writ of certiorari *sub nom. United States* v. *Coblentz*, No. 259, this Term. The *Coblentz* case is not authority for the disposition of the instant case. The latter involves a determination of property rights under § 36-a of the New York Lien Law, whereas the *Coblentz* case was concerned with the taxpayer's property interests under an assignment contract, § 475 of the New York Judiciary Law, and § B15-37.0 of the New York City Administrative Code.

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# REME COURT OF THE UNITED STATES

Nos. 1 AND 23.—OCTOBER TERM, 1959.

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| rt Aquilino and Joseph<br>ero, d/b/a Home Main-<br>ance Company, and Colo-<br>l Sand and Stone Co.,<br>., Petitioners,<br>*v.*<br>d States of America, Ada<br>Bottone, et al. | On Writ of Certiorari to the Court of Appeals of the State of New York. |
| ited States of America,<br>Petitioner,<br>*v.*<br>am Lumber Company,<br>l George H. Carter, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. |

[June 20, 1960.]

. JUSTICE HARLAN, dissenting in Nos. 1 and 23.

m unable to subscribe to the reasoning which under-
he Court's disposition of these cases. By holding
they both turn on whether the taxpayer had "prop-
under state law to which the Government's lien
attach, the Court has sanctioned a result consist-
prohibited by us in a line of cases dealing with the
ity of federal tax liens.[1]

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[1] *ited States* v. *Security Trust & Savings Bank*, 340 U. S. 47
); *United States* v. *City of New Britain*, 347 U. S. 81 (1954);
*l States* v. *Acri*, 348 U. S. 211 (1955); *United States* v. *Liver-*
*& London Globe Ins. Co., Ltd.*, 348 U. S. 215 (1955); *United*
v. *Scovil*, 348 U. S. 218 (1955); *United States* v. *Colotta*, 350
808 (1955); *United States* v. *White Bear Brewing Co.*, 350
1010 (1956); *United States* v. *Vorreiter*, 355 U. S. 15 (1957);
*l States* v. *Ball Construction Co., Inc.*, 355 U. S. 587 (1958);
*l States* v. *Hulley*, 358 U. S. 66 (1958).

In both cases, the delinquent taxpayer is a defaulting general contractor whose subcontractors remain unpaid. The Government's lien is asserted against the chose in action which the general contractor allegedly holds against the owner of the real estate on which the improvements were made, in respect of amounts due from the owner under the construction contract. If the subcontractors had sought to enforce their claims by imposing a lien on that chose in action, there is no question that the Government's lien would prevail. Under the decisions of this Court cited in note 1, *supra*, a federal tax lien asserted against a taxpayer's property under §§ 3670 and 3671 of the Internal Revenue Code of 1939 [2] prevails over all other claims against such property except (1) those which attach and become "choate" before the federal lien attaches, and (2) those specifically protected by § 3672 (a).[3] It is conceded that the interests of the subcontractors in the present cases are not protected by § 3672 (a) and would not be considered choate under the applicable decisions. See *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C. A. 2d Cir. 1955).

The Court believes, however, that the present cases are different, because under state law, the general contractor in *Aquilino* held his claim against the owner in trust for the subcontractors to the extent of their claims, and because the subcontractors in *Durham Lumber* were given, to the extent of their claims, a direct right of action

[2] The text of these sections, applicable in the *Aquilino* case, are set forth in note 1 of the Court's opinion in No. 1, *ante*, —. The comparable provisions of the Internal Revenue Code of 1954, §§ 6321 and 6322, applicable in the *Durham Lumber* case, are printed in notes 1 and 2 of the Court's opinion in No. 23, *ante*, —.

[3] That section provides: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector . . . ." The comparable provision of the Internal Revenue Code of 1954 is § 6323 (a).

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against the owner in respect of his debt to the general contractor, and that in these circumstances the rights of the subcontractors in the owner's debt are superior to those of the general contractor. It is said that, to the extent of the subcontractors' claims, the general contractor, under state law, thus had no "property" interest in the amounts due him from the owner, and that under the principles enunciated in *United States* v. *Bess*, 357 U. S. 51, a federal tax lien can attach only to a property interest which exists under state law.

I cannot see how it makes any difference, for purposes of the federal tax-lien statute, whether state law purports to prefer subcontractors over the general contractor and parties claiming through him by giving the subcontractors a lien on the general contractor's right of action against the owner or by giving them a prior right to collect the debt itself. In both instances, the owner is under a contractual duty to pay the general contractor and the latter is under a contractual duty to pay the subcontractors. In both instances, the subcontractors are attempting to satisfy their claims against the general contractor. And in both instances, they are seeking to satisfy themselves by claiming precisely the same thing—a prior right in the proceeds of the debt which arises by virtue of the contractual relationship between the owner and the general contractor.[4] In neither instance can the subcontractors

[4] It is noteworthy that the North Carolina law involved in the *Durham Lumber* case requires the general contractor to furnish the owner with a statement of subcontractors' claims "before receiving any part of the *contract price, as it may become due*," and that it is thereafter the duty of the owner to retain an appropriate amount from the money *then due the contractor*." N. C. Gen. Stat., 1950, 44-8. (Emphasis added.) Although this section indicates that the general contractor has no right to collect the proceeds of the main contract until the statutory conditions are satisfied, it obviously recognizes the owner's contractual obligation as the real basis of the

collect more than that to which the subcontract entitles them, and in neither can the owner be required to pay more than that to which the main contract obligates him. If federal law requires that subordination of the general contractor's interest be ignored in the one instance, it does so equally in the other.

The *Bess* case does not require a contrary conclusion. That case held only that while a federal tax lien attached to the cash surrender value of a life insurance policy owned by the taxpayer, it did not attach to the proceeds paid on his death, because under state law he had no right to such proceeds during his life. There was no reason under those circumstances why state property concepts should not control. To read that case as standing for the proposition that such concepts must also be controlling in cases such as these defeats the rule that "the relative priority of the lien of the United States for unpaid taxes is . . . always a federal question to be determined finally by the federal courts." *United States* v. *Acri*, 348 U. S. 211, 213. It is one thing to say, as the Court did in *Bess*, that the federal interest in uniform application of federal tax liens does not require, as a general rule, that state property concepts be disregarded. It is quite another to permit such concepts to control the extent of a federal lien's application in situations indistinguishable from those where the Court has in fact, rightly or wrongly, enforced a uniform federal rule. Given federal supremacy in this field, it surely cannot be that the federal courts may not appraise for themselves the true impact of state-created rights upon the priority of federal tax liens within the criteria established by this Court. Cf. *Carpenter* v. *Shaw*, 280 U. S. 363, 367; *City*

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transaction and the source of the subcontractors' rights. The subcontractors' claims are thus not akin to liens on the owner's real estate, as this Court suggests, but are asserted solely in respect of the monetary claim held by the general contractor against the owner.

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*of Detroit* v. *Murray Corporation*, 355 U. S. 489, 492. To recognize the substantial equivalence of the situations is not to create a new rule of federal property law but to require an evenhanded application of an already established one. It seems to me that Judge Fuld of the New York Court of Appeals was quite right in holding in the *Aquilino* case that New York could not, consistently with the past decisions of our Court, defeat the otherwise superior federal lien upon the owner's debt to the general contractor by converting the debt into a trust for the benefit of the subcontractor.[3]

To read *Bess* as the Court does can only lead to confusion in the administration of the federal tax-lien statute. A taxpayer's property in a debt is surely diminished by the imposition of a lien on his interest, for he has no right to collect the liened portion nor to alienate it. Yet in precisely this situation, we have held that the federal tax lien is not affected by such diminution. *United States* v. *Liverpool & London Globe Ins. Co., Ltd.*, 348 U. S. 215. If this holding is to be preserved after today's decision, subsequent cases must turn on the elusive distinction between diminishing a greater property interest and

[3] "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (See United States v. Forreiter, 355 U. S. 15, revg. 134 Col. 543; United States v. White Bear Brewing Co., 350 U. S. 1010, revg. 227 F. 2d 359; United States v. Colotta, supra, 350 U. S. 808, revg. 224 Miss. 33; United States v. Scovil, supra, 348 U. S. 218, 220-221; United States v. New Britain, supra, 347 U. S. 81, 84-87; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237). That being so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36-a; § 13, subd. [7])—may not be construed to affect the rights of the government or the priority of its tax lien." 3 N. Y. 2d, at 516, 146 N. E. 2d, at 777-778.

initially conferring a lesser one.[6] The very difficulty which this Court experiences in trying to determine whether under New York law the general contractor really holds only a bare legal title in trust for the subcontractors or has full ownership of the debt subject to a lien in favor of the subcontractors demonstrates the futility of attempting to draw such distinctions for federal purposes. I venture to suggest that on remand, the Court of Appeals can with equal facility label the subcontractors' interests "property" or a "lien," the relevant incidents of the relationship being the same in either case. Why should not that court, and the legislatures of other States readily respond in choosing the former alternative?

I would affirm the judgment in No. 1, and would reverse in No. 23 on the ground that North Carolina can under no circumstances accord subcontractors a right in the proceeds of the debt arising from the construction contract superior to the Government's lien without satisfying one of the two requirements laid down by federal law. If the

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[6] It will not do to distinguish the present type of case from the lien-priority cases on the ground that in the latter cases the taxpayer remains the owner in a very real sense and can continue to enjoy the property if he discharges the debt it secures. In both instances, the taxpayer is temporarily deprived of certain incidents of ownership as a device for securing the payment of a debt, and is restored to the full enjoyment of the property only when the debt is discharged. And it is illusory to say that ownership of a debt which can be neither collected nor alienated is any more "real" than the ownership of no debt at all. Whether the diminution of the taxpayer's interest is sufficiently definite and complete to conclude the federal lien is precisely the question on which this Court has held federal law must control. It is admitted that, if the federal standard of "choateness" developed by this Court in the lien-priority cases is applied, the incidents of ownership retained by the taxpayers here must in fact be deemed greater than those retained by taxpayers in cases where state-created liens imposed on their interests have prevailed over the Government's lien.

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federal standard of choateness is thought to be an undesirable restriction on the States' freedom to regulate property relationships, the cases establishing that standard should be expressly overruled and not emasculated by dubious distinctions.

MR. JUSTICE BLACK, while adhering to the dissenting views expressed by him in *Commissioner* v. *Stern*, 357 U. S. 39, 47, and *United States* v. *Bess*, 357 U. S. 51, 59, concurs in this opinion.